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## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 210

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HOWARD HALL COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTER-  
STATE COMMERCE COMMISSION

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ALABAMA

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FILED JUNE 26, 1941.



SUPREME COURT OF THE UNITED STATES

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HOWARD HALL COMPANY, INC., APPELLANT,

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[fol. 1]

1

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ALABAMA,  
SOUTHERN DIVISION**

No. 5215

**HOWARD HALL COMPANY, INC.**

**versus**

**UNITED STATES OF AMERICA**

**PETITION OF HOWARD HALL COMPANY—Filed February 28,  
1941**

To the Honorable, the Judges of the District Court of the United States, for the Northern District of Alabama, Southern Division:

The petition of Howard Hall Company, Inc. respectfully shows:

1

Howard Hall Company, Inc. is a corporation organized under the laws of Alabama and has its principal office and principal place of business located in Birmingham, County of Jefferson, Alabama.

2

This is a suit brought against the United States to set aside orders of the Interstate Commerce Commission and to require an investigation of the matters involved. This suit is brought under the provisions of Section 205 (g) of Part II of the Transportation Act of 1940, which provides for review of final orders of the Interstate Commerce Commission. Jurisdiction of this court depends upon sub-division 28 of Section 41 and Sections 43 and 45-48, inclusive of Title 28 of the United States Code, which provides for actions to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission and the jurisdiction of said court depends upon the fact that this action arises under the Constitution and laws of the United States and is brought to set aside an order of the Interstate Commerce Commission.

The petitioner, Howard Hall Company, Inc., is a common carrier motor vehicle engaged in the transportation of commodities generally in interstate commerce between points [fol. 2] in the states of Alabama, Mississippi, Louisiana, Florida, Georgia, Tennessee, Kentucky, Indiana, Ohio, West Virginia, Virginia, North Carolina, South Carolina, Maryland, Delaware, Pennsylvania, New York. Petitioner began these operations prior to June 1, 1935, and has continuously conducted the operations set out above since that time. In compliance with the provisions of the Motor Carrier Act of 1935, petitioner, in accordance with the rules of the Commission, filed an application for a certificate of convenience and necessity under the provisions of Section 206 of that Act. 49 Stat. 551; 52 Stat. 1238; 49 U. S. C. A., Section 306. This application filed by petitioner sought authority to operate as a common carrier of commodities generally over irregular routes between points in the States set out above. The application was filed within the required one hundred twenty (120) days from October 1, 1935.

The application of petitioner was assigned Docket No. MC-42318 by the Interstate Commerce Commission and was set by the Commission for hearing before an Examiner of the Commission on February 15, 1937. At this hearing, petitioner introduced evidence of its operations prior to June 1, 1935 and continuously since that time. The recommended report and order of the Trial Examiner was issued May 13, 1937, but upon motion of the petitioner this order was set aside and the case was reassigned for further hearing on August 20, 1937. At this hearing additional testimony and exhibits showing the operations of petitioner prior to June 1, 1935 and also between June 1, 1935 and October 15, 1935 were introduced. On November 30, 1937, the Trial Examiner issued an order recommending that certain rights be granted. Exceptions to this recommended order and report were filed by petitioner in compliance with the rules of the Interstate Commerce Commission. On July 10, 1940, Division 5 of the Interstate Commerce Commission decided the case and in doing so granted only part of the authority applied for and issued an order that part of the application be denied. The effective date of this order was

August 31, 1940. A copy of the decision and order thereon is attached hereto and marked Exhibit A and made a part of this paragraph of this petition.

[fol. 3]

5

Your petitioner, before August 31, 1940, filed an application to the Commission to rehear and reconsider its order, on the ground that the undisputed testimony demonstrated that a finding that all of the authority sought should have been granted and upon further ground that the Commission had not considered the documentary evidence of operations which were conducted by petitioner between June 1, 1935 and October 15, 1935 and continuously since that time. Several postponements of the effective date of the order of August 31, 1935 were granted by the Commission, but on February 3, 1941, the Interstate Commerce Commission issued a final order of denial, a copy of which is attached hereto and marked Exhibit B, and made a part of this paragraph of this petition.

6

In the investigation conducted by the Interstate Commerce Commission and in the opinion of the Commission and its findings and conclusions and orders based thereon, petitioner submits that the Commission acted arbitrarily, contrary to the law and contrary to the evidence in the following particulars, to-wit:

(a) The Commission, in its decision, found:

"Of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, 55 moved to or from points within 100 miles of Birmingham, 50 moved between points in States other than Alabama, and 15 moved from Fowl River, Ala. The 15 shipments from Fowl River were handled during 1934 and consisted of satsumas destined to points in six States. None have been transported from that point since.

"Of 2,550 shipments handled after June 1, 1935, 2,030 moved to or from Birmingham, 270 moved to or from points within 100 miles of Birmingham, and 250 moved between points in States other than Alabama.

"Of the 50 shipments transported prior to June 1, 1935, between points in States other than Alabama, 30 moved from Vincennes and Seymour, Ind., to eight points in

4

Georgia, and 10 from Wheeling, W. Va., to four points in Tennessee. The remaining 10 shipments moved between scattered points in eight States.

"Of 875 shipments moving to or from Birmingham prior to June 1, 1935, 700 were transported to or from 47 points in North Carolina, 34 points in Georgia, 18 points in Mississippi, 20 points in South Carolina, and 20 points in that part of Florida north of and including Tampa and Lakeland." (Sheets 3 and 4)

[fol. 4] It was further stated:

"It is clear that shipments other than those described above, moving prior to June 1, 1935, between points in States other than Alabama, and between Birmingham and vicinity, on the one hand, and other states, on the other, were not made with any degree of regularity and do not represent a substantial showing of service sufficient to establish bona fide operations since prior to June 1, 1935, from, to, and between all points in the broad territory claimed." (Sheet 7.)

After these statements, the Commission then found that the petitioner was entitled to operate as a common carrier

• • • between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee thence U. S. Highway 192 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Wheeling to Chattanooga and Birmingham; all over irregular routes; • • •" (Sheet 8.)

The petitioner having produced conclusive evidence of 55 movements of freight to or from points within 100 miles of Birmingham prior to June 1, 1935, and 270 movements of freight thereafter, it was error as a matter of law for the Commission to deny the right to operate in this territory.

(b) Even though the petitioner's application was broader than its proof, the Commission erred in not granting the authority which was supported by positive evidence of operation. It was error as a matter of law not to grant the authority in accordance with the evidence and actual findings of the Commission, even though the authority applied for might have been greater. The findings of the Commission showed movements between points in the territories and 100 mile radius of Birmingham and it was error of the Commission to limit the scope of petitioner's operation to within ten miles of Birmingham.

(c) The Commission erred as a matter of law in granting authority to transport limited commodities between certain points because if the findings show any movement of any [fol. 5] commodity between points and places or within a territory, the Commission should grant authority within that territory for all commodities and should not restrict the transportation to limited commodities. For example, the Commission found that petitioner had operated as a common carrier "of paper and paper products from Birmingham to New Orleans, Louisiana, Chattanooga and Knoxville, Tennessee." Under Section 206 of the Motor Carrier Act, the Commission is without jurisdiction to limit the operations of any applicant to certain commodities. The Act refers to routes and territories and it was error for the Commission to limit the operations of petitioner to limited commodities if they found that applicant had operated between the points or within the territory.

(d) The Commission erred as a matter of law in considering evidence of continuous operations beyond the date of filing of this application, to-wit: February 12, 1936. Section 206 of the Motor Carrier Act requires a finding of operations prior to June 1, 1935 and "continuously since that time." Since that time could only mean since the time of the filing of the application. Therefore, the Commission erred as a matter of law in not granting the operations proved by the applicant prior to June 1, 1935 and continuously until February 12, 1936.

(e) The Commission erred as a matter of law in not considering the evidence of operations between June 1, 1935 and October 15, 1935. Section 206 (b) provides:

"Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such

form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission."

Under the foregoing provisions, it was mandatory that the Commission review this evidence and grant a certificate in accordance with the proof of operations during this interim period.

[fol. 6]

7

Petitioner began its operations in 1934 and has operated continuously since that time. Prior to that time petitioner's general manager and principal stockholder had operated for about four years, which rights were transferred to Howard Hall Company, Inc. Petitioner has developed a large volume of business between points in Alabama and points in Virginia, Maryland, District of Columbia, New Jersey, New York, Pennsylvania and Delaware. If the present order of the Interstate Commerce Commission is allowed to stand, the public will suffer irreparable damage because a large amount of petitioner's business is within the aforesaid territory. Under the existing order, petitioner will be required to cease operations within this territory and the shipping public would be deprived of petitioner's service, which it has enjoyed for the past ten years. Unless the order of the Commission is stayed by this court, the petitioner will be deprived of forty per cent of its present operating revenue, which will cause irreparable injury and damage to your petitioner and would result in irreparable injury and damage to the shipping public.

Wherefore, petitioner prays:

- (1) That the court temporarily stay the order of August 31, 1940, issued by the Commission, which became final on

February 3, 1941, pending hearing upon interlocutory injunction; so that petitioner and the general public will not suffer irreparable injury and damage as a result of the order becoming effective.

(2) That an interlocutory injunction be granted sustaining and restraining the enforcement, operation and execution of said order of the Interstate Commerce Commission insofar as such orders amount to a denial of the authority applied for in petitioner's application before the Commission under Section 206 of the Motor Carrier Act.

(3) That a permanent injunction be granted restraining the enforcement, operation and execution of said order of the Interstate Commerce Commission insofar as such orders amount to a denial of the authority applied for in petitioner's application before the Commission under [fols. 7-8] Section 206 of the Motor Carrier Act.

(4) That the application of petitioner before the Interstate Commerce Commission be reopened for further proceedings before the Commission in accordance with the prayers of this complaint.

(5) That notice hereof be served upon the United States, by serving a copy thereof upon the District Attorney of the Northern District of Alabama, Southern Division, and upon the Attorney-General of the United States, and upon the Secretary of the Interstate Commerce Commission, according to law, and that a temporary restraining order, interlocutory injunction and permanent injunction be granted, according to the prayers of this complaint.

(6) That a 3-Judge Court be assembled, as required by statute, that a hearing be had at the earliest possible date to the end that irreparable damage may be prevented by the granting of a temporary restraining order and an interlocutory injunction.

(7) That the court make such other and further orders as is meet and proper in the premises and petitioner will ever pray.

(Signed) Edgar Watkins and Allan Watkins, Boutwell & Pointer, Attorneys for Petitioner, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia.

*Duly sworn to by Howard Hall. Jurat omitted in printing.*

[fol. 9] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed Feb. 28, 1941

The foregoing bill read and considered. Let notice be given to the United States, as required by the statutes governing such a proceeding.

The order of the Interstate Commerce Commission dated August 31, 1940, which, by another order, became effective February 3, 1941, is hereby stayed and set aside pending hearing upon interlocutory injunction and the Interstate Commerce Commission is hereby restrained from interfering with the operations of petitioner in accordance with the authority heretofore applied for by petitioner in its application to the Commission under Section 206 of the Motor Carrier Act. Petitioner having operated as a common carrier for the past seven years in accordance with its application, irreparable injury would result to petitioner and the general public if the restraining order were not granted pending further hearing of this application.

This 28th day of February, 1941.

T. A. Murphree, Judge, District Court of the United States, for the Northern District of Alabama, Southern Division.

[File endorsement omitted.]

[fol. 10]

EXHIBIT A TO PETITION

INTERSTATE COMMERCE COMMISSION

No. MC-42318

HOWARD HALL, INC., Common Carrier Application

Submitted February 4, 1938. Decided July 10, 1940.

REPORT OF THE COMMISSION

Division 5, Commissioners Lee, Rogers, and Patterson,  
by Division 5:

Exceptions were filed by applicant and by protestants to the order recommended by the examiner. Our conclusions differ from those recommended.

By application filed February 11, 1936, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, Howard Hall Company, Inc., of Birmingham, Ala., seeks a certificate of public convenience and necessity authorizing continuance of operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson.

Two hearings have been held. At the first the application was amended by eliminating therefrom all points in Wisconsin, Texas, Arkansas, Kansas, and Missouri, and points in Florida south of Tampa and Lakeland, and points north of Chicago. Certain rail and motor carriers opposed the application.

Applicant was incorporated in Alabama in 1934 and in [fol. 11] July 1934 it was registered under the Code of Fair Competition for the trucking industry. As of June 1, 1935, applicant owned and operated 11 trucks which number had increased to 17 at the time of the first hearing in February 1937. Although applicant claims "grandfather" rights to conduct operations between all points in a vast territory comprising practically all of the United States east of the Mississippi River except the New England States, the record shows that prior to June 1, 1935, its traffic moved preponderately between Birmingham and vicinity, on the one hand, and various points in eastern United States, on the other. As will hereinafter be shown, applicant has not served enough representative points in all the States claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application.

Exhibits purporting to show all shipments in interstate or foreign commerce handled by applicant during the years 1934, 1935, and 1936, were submitted in evidence. These include operations into territories which have been withdrawn from the application. Those operations will not be

considered further. Of 1,000<sup>1</sup> shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, 55 moved to or from points with 100 miles of Birmingham, 50 moved between points in States other than Alabama, and 15 moved from Fowl River, Ala. The 15 shipments from Fowl River were handled during 1934 and consisted of satsumas destined to points in six States. None have been transported from that point since.

Of 2,550 shipments handled after June 1, 1935, 2,030 moved to or from Birmingham; 270 moved to or from points within 100 miles of Birmingham, and 250 moved between points in States other than Alabama.

Of the 50 shipments transported prior to June 1, 1935, between points in States other than Alabama, 30 moved from Vincennes and Seymour, Ind., to eight points in Georgia, and 10 from Wheeling, W. Va., to four points in Tennessee. The remaining 10 shipments moved between scattered points in eight States.

Of 875 shipments moving to or from Birmingham prior [fol. 12] to June 1, 1935, 700 were transported to or from 47 points in North Carolina, 34 points in Georgia, 18 points in Mississippi, 20 points in South Carolina, and 20 points in that part of Florida north of and including Tampa and Lakeland. In this operation the record shows that prior to and since June 1, 1935, applicant handled a wide variety of commodities including paper and paper products, cloth, preserves, peanut butter, building materials, ornamental iron, glass bottles, pipe, plumbing fixtures, canned goods, fruits and vegetables.

*In Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, in discussing bona fide operation within the meaning of section 206 (a) of the act, division 5 said:

On the other hand, the word "operation" is not to be too narrowly construed, and in that connection the holding out of the carrier must be taken into consideration. For example, in the case of a common carrier of household goods or of oil-field supplies serving a large territory over irregular routes, we grant certificates under the "grand-

<sup>1</sup> Numbers of shipments handled during specified periods or between certain points herein mentioned are approximations.

father" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "grandfather" certificates to haul "general commodities," that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business. A mere holding out without evidence of the operation consistent therewith is not enough.

In the instant proceeding, the record shows that prior to and since June 1, 1935, applicant has held itself out to transport general commodities, with certain exceptions,<sup>2</sup> between Birmingham and vicinity, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those points in that part of Florida north of and including Tampa and Lakeland, and has actually conducted an operation consistent with such holding out.

In addition the record shows that prior to and since June 1, 1935, applicant transported paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tennessee, and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings [fol. 13] from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va., and matches from Wheeling to Chattanooga and Birmingham.

The record shows that applicant also transported cloth from Birmingham to Versailles, Ohio, and Huntington, W. Va., and from Canton and Jasper, Ala., to Wheeling, W. Va.; canned goods from Vincennes, Underwood, Plainville, and Washington, Ind., to Birmingham, Montgomery, and Anniston, Ala., and from Vincennes and Seymour, Ind., to eight points in Georgia; scrap metals, aluminum castings, and brass from Birmingham to Chicago; aluminum from Birmingham to East Chicago, Ind.; ornamental iron, bolts, thresholds, and other building materials from Birmingham to Danville, Ill. Although these operations were performed

<sup>2</sup> The record does not show that applicant ever transported or held itself out to transport commodities of unusual value, high explosives, commodities in bulk, or those requiring special equipment.

with some degree of regularity prior to June 1, 1935, the record fails to show that such service has been performed regularly since that date.

On exceptions, applicant concedes that it may not be entitled under the "grandfather" clause to authority to transport general commodities from, to, and between all points covered by the amended application, but it insists that it is entitled to authority to transport general commodities between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia, Louisiana, Mississippi, Tennessee, Ohio, Indiana, Illinois, West Virginia, and those in Florida north of and including Tampa and Lakeland. As pointed out above, however, only 55 shipments were transported prior to June 1, 1935, to or from points within 100 miles of Birmingham. The record shows further that only 12 points were served in this comparatively large territory surrounding applicant's headquarters at Birmingham. Undoubtedly, however, applicant did serve various industries located in the immediate vicinity of Birmingham. The extent of this industrial area is not clear from the record but we believe that a radius of 10 miles of Birmingham will include all that is important.

[fol. 14] *nI Powell Bros. Truck Lines, Inc., Com. Car. Application*, 9 M. C. C. 785, upon considering operations over irregular routes in a broad territory division 5 said:

Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the "grandfather" clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service.

It is clear that shipments other than those described above, moving prior to June 1, 1935, between points in

States other than Alabama, and between Birmingham and vicinity, on the other hand, and other States, on the other, were not made with any degree of regularity and do not represent a substantial showing of service sufficient to establish bona fide operations since prior to June 1, 1935, from, to, and between all points in the broad territory claimed: No shipments whatever are shown to have been handled by applicant prior to June 1, 1935, to or from points in Delaware, Maryland, Michigan, New Jersey, and the District of Columbia.

Applicant also claims the right to transport uncrated household goods. The record shows, however, that prior to June 1, 1935, only two shipments of household goods were transported, one from Gorgas, Ala., to Panama City, Fla., and the other from Birmingham to Atlanta, Ga. Both shipments were made on February 1, 1935. Although we are inclined to be liberal in granting authority to so-called household goods movers, we are of the opinion that these two shipments of household goods are not a sufficient basis for the granting of authority under the "grandfather" clause of the act. It is clear that applicant has never had a [fol. 15] specialized household moving service.

We find that applicant was, on June 1, 1935, and continuously since that time, has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, high explosives, commodities in bulk, commodities requiring special equipment, and household goods, uncrated or in lift vans in connection with so-called "household moving," between Birmingham, Ala., and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee thence U. S. Highway 192 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Wheeling to Chattanooga and Birmingham; all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof;

and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and with our rules, regulations, and requirements thereunder, an appropriate certificate will be issued. An order will be entered denying the application, except to the extent that the issuance of a certificate is authorized in the above findings.

---

[fol. 16]

**ORDER**

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 10th day of July, A. D. 1940.

No. MC-42318

HOWARD HALL COMPANY, INC., Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed its report herein, containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

*It is ordered*, That said application, except to the extent granted in said report, be, and it is hereby denied, effective August 31, 1940.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

---

[fol. 17]

**EXHIBIT B TO PETITION**

**Order**

At a General Session of the Interstate Commerce Commission, Held at its office in Washington, D. C., on the 3rd day of February, A. D. 1941.

No. MC 42318

Howard Hall Company, Inc.

Common Carrier Application

Birmingham, Alabama

Upon consideration of the record of the above-entitled matter, of applicant's petition for further hearing, consolidation with No. MC 42318 (Sub No. 1), and further postponement of the effectiveness of the denial order herein; and good cause appearing:

*It is ordered*, That the said petition be, and it is hereby denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 18]

## PLAINTIFF'S EXHIBIT No. 1

26

(Here follow 2 photolithographs, side folios 19-20)

Plaintiff's Exhibit No. 1

E.M.C. 4



26

## ALTERNATE FORM

## PROPERTY AND PASSENGER CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form may be used only by Common Carriers engaged in transportation of property or passengers in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter, and may be used in lieu of either B.M.C. 1 or 2, and must be filed on or before February 12, 1936.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

42318

Application of Howard Hall Co., Inc. )  
 (Full name) ) DOCKET NO. )  
 for appropriate authority to continue to operate as a motor carrier under )  
 the Motor Carrier Act, 1935. ) (Do not fill in)

## APPLICATION

To the Interstate Commerce Commission, Washington, D. C.

## APPLICANT STATES:

Applicant's name is Howard Hall Co. Inc.Business address 1909 Avenue B, South 2809-2nd Ave. Birmingham  
 (Street and number) (City)Jefferson Alabama  
 (County) (State)Applicant is a Corporation doing business under the trade name or style of  
 (Individual, partnership or corporation)

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

See Exhibit Attached  
 (Describe briefly the route, routes, or territory served)
 INTERSTATE  
 COMMERCE COMMISSION  
 RECEIVED  
 FEB 11 1936

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

Applicant's name is Howard Hall Co. Inc.

Business address 1909 Avenue B, South 2809-2nd floor, Birmingham  
(Street and number) (City)

Jefferson

(County)

Alabama

(State)

Applicant is a Corporation doing business under the trade name or style of  
(Individual, partnership or corporation)

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

See Exhibit Attached

(Describe briefly the route, routes, or territory served)

INTERSTATE  
COMMERCE COMMISSION  
RECEIVED  
FEB 9 1936

In filing this application, Applicant agrees to furnish all of the facts, statements, data, and evidence which are required in Forms B.M.C. 1 or 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

Applicant has complied with the orders of the Commission relative to the service of application on interested parties; and will submit such additional information to substantiate Applicant's prayer herein as the Commission may require.

Applicant reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver thereof.

WHEREFORE, Applicant hereby applies to the Interstate Commerce Commission for appropriate authority to continue to operate as a motor carrier, pursuant to Section 206(a) or Section 209(a) of the Motor Carrier Act, 1935.

Dated this 8th day of February, 1936.

Howard Hall Co. Inc.

(Applicant)

By Howard Hall (Title) President

(OVER)

-19-

VOL

## OATH

State of \_\_\_\_\_

County of AlabamaJefferson(Name of affiant)  
Howard L. Hale

makes oath and says that he is the

(Title of affiant)  
Presidentof the \_\_\_\_\_, that he is authorized on the part of said applicant to  
(Name of applicant)  
Howard L. Hale, Inc.

verify and file with the Interstate Commerce Commission this application; that he has carefully examined all of the statements contained in such application; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Howard L Hale

Subscribed and sworn to before me, a \_\_\_\_\_ in and for the State and County above named,

this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

Notary Public

5th } day of February 19\_\_\_\_

(SEAL)  
My commission expiresJune 1-1936N. H. Burton

GENERAL INSTRUCTIONS

This is an emergency form which MAY be used as an alternate form in lieu of either Forms B.M.C. 1 or 2, by those claiming rights under the "Grandfather" clause of the Motor Carrier Act, 1935, as Common Carriers of property or passengers on June 1, 1935, or Contract Carriers on July 1, 1935, and continuously thereafter in interstate or foreign commerce. All those who use this form will be required subsequently to support the allegations of the application by furnishing all of the facts, statements, data, and other evidence required in Forms B.M.C. 1 and 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

"Certificates of public convenience and necessity" will be issued to Common Carriers, and "Permits" to Contract Carriers.

Applications on this form or on B.M.C. 1 or 2 must be filed on or before February 12, 1936. The Interstate Commerce Commission does not have authority under the Motor Carrier Act, 1935, to further extend the time for filing beyond said date. Loss of rights under the "Grandfather" clause will result from a failure to file applications therefor within the time above specified. If an operator is in doubt as to whether the service he renders comes within any of the exemptions provided in the Act, he should file an application. The filing of such application will not be deemed a waiver of any right to claim exemption from any and all provisions of the Motor Carrier Act, 1935.

Applications should be typed, and one copy kept in Applicant's files. The original of this application, properly signed and sworn to before a notary public, and one additional copy must be returned to:

THE INTERSTATE COMMERCE COMMISSION  
BUREAU OF MOTOR CARRIERS  
WASHINGTON, D.C.

and one true copy must be filed with the Board, or Governor if there is no Board, of each State within which operations covered by this application are conducted.



[fol. 21] Our operations cover the following states, and the following towns and cities but not limited to the towns as we serve the intermediate points, and also serve towns and cities within a radius of two hundred miles of these towns and cities.

**Alabama**

Birmingham, Jasper, Tuscaloosa, Eutaw, Demopolis, Jackson, Mobile, Andalusia, Dothan, Troy, Eufaula, Opelika, Montgomery, Clanton, Sylacauga, Anniston, Huntsville, Gadsden, Florence.

**Tennessee**

Chattanooga, Knoxville, Kingsport, Nashville, Dickson, Memphis, Jackson.

**Kentucky**

Louisville, Harlan.

**Indiana**

Indianapolis, Austin, Vincennes, Richmond, Auburn, Fort Wayne.

**Michigan**

Benton Harbor, Detroit.

**Illinois**

Chicago, Harrisburg, Effingham, Danville, Springfield, Peoria, Zion, Kewanee, Alton.

**Wisconsin**

Marshfield, Milwaukee.

**Missouri**

Springfield, St. Louis, Kansas City, St. Joseph.

**Kansas**

Topeka, Garnett.

**Arkansas**

Little Rock, Hot Springs, Stuttgart.

**Louisiana**

Shreveport, Ruston, New Orleans, Alexandria, Baton Rouge, Houma, De Ridder.

[fol. 22]

## Ohio

Cincinnati, Versailles, Columbus, Canton, Sandusky.

## District of Columbia

Washington.

[fol. 23]

## Mississippi

Columbus, Tupelo, Corinth, Greenville, Vicksburg, Natchez, Brookhaven, Jackson, Meridian, Hattiesburg, Laurel, Gulfport, Pascagoula.

## Florida

Pensacola, Panama City, Jacksonville, Tampa, Miami, Daytona Beach.

## South Carolina

Columbia, Greenwood, Greenville, Spartanburg, Chester, Cheraw, Hartsville, Sumter, Charleston, Conway.

## North Carolina

Belmont, Charlotte, Canton, Asheville, Roddus, Marion, Winston Salem, Greensboro, Raleigh, Durham, Fayetteville, Wilmington, Washington.

## West Virginia

Huntington, Charleston, Wheeling.

## Virginia

Norfolk, Suffolk, Danville, Fredricksburg, Richmond, Harrisonburg, Winchester, Front Royal, Chase City.

## Maryland

Baltimore.

## Delaware

Wilmington.

## Pennsylvania

Philadelphia, Reading, Pittsburgh, Erie, Easton.

## New Jersey

Trenton.

New York

New York City, Buffalo.

Texas

Henderson.

We desire to cooperate with you in every way possible, and we hold our books, records and entire operation open to you for your inspection at all times.

Howard Hall Co., Inc. Howard L. Hall.

[fols. 24-209] (Note: The other papers in Plaintiff's Exhibit #1 were not designated in the record, and are omitted from this transcript.)

[fol. 210] DECISION OF DIVISION 5 OF THE INTERSTATE COMMERCE COMMISSION RENDERED JULY 10TH, 1940

Omitted. Printed side page 10 ante.

[fol. 211] ORDER OF THE INTERSTATE COMMERCE COMMISSION ISSUED FEBRUARY 3, 1941, DENYING PETITION FOR FURTHER REHEARING

Omitted. Printed side page 17 ante.

[fol. 212] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed April 14, 1941

The defendant, United States of America:

1. Admits the allegations of paragraphs 1 and 2 of the complaint.
2. Admits those allegations of paragraphs 3, 4, 5 and 7 which correspond to the statement of the proceedings, and

to the findings of fact, contained in the report of the Commission, attached as Exhibit A to the complaint; and denies all others.

3. Denies the allegations of paragraph 6.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Department of Justice, Washington, D. C. Counsel for the United States.

Thurman Arnold, Assistant Attorney General; Jim C. Smith, Esq., United States Attorney.

April —, 1941.

[fol. 213] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed April 14, 1941

Comes now the Interstate Commerce Commission (hereinafter called the Commission) and, pursuant to leave of Court granted under Sections 212 and 213 of the Judicial Code (U. S. C. Title 28, Sec. 45a) having intervened as a party defendant in the above-entitled cause, for its answer to the complaint herein, says:

I

Answering paragraphs 1 and 2 of the complaint, the Commission, for the purposes of this answer and none other, admits the truth of the allegations therein contained.

[fol. 214]

II

Answering the allegations of paragraphs 3 to 7, inclusive, of the complaint, the Commission admits that the plaintiff is at present a common carrier by motor vehicle, but states that it has no knowledge sufficient to form a belief as to the nature and extent of the plaintiff's present operation as such, and the Commission denies that prior to June 1, 1935, and continuously since that date, the plaintiff has conducted the operations alleged in paragraph 3 of the complaint or as alleged in the plaintiff's application for a certificate of convenience and necessity under the Motor Carrier Act which, as alleged in said complaint, the plaintiff filed with the Commission in 1935.

Further answering said paragraphs of the complaint, the Commission alleges and shows that on or about February 11, 1936, plaintiff filed with the Commission its application for a "grandfather" certificate as a common carrier or a permit as a contract carrier under Section 206 or Section 209 of the Motor Carrier Act of 1935, which would authorize operation by the plaintiff between all points within the states of Alabama, Georgia, Tennessee, Kentucky, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, District of Columbia, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey and New York, and designated portions of Michigan, Kansas and Texas; that upon said application the Commission instituted a proceeding entitled Docket No. 42318, *Howard Hall Company, Inc. Common Carrier Application*; that divers other carriers [fol. 215] by rail and by motor vehicle intervened, protested and objected to the issuance of the certificate or permit prayed by the plaintiff; that the Commission set the matter for hearing before a Commission examiner on February 15, 1937, at Birmingham, Ala.; that at the opening of said hearing the plaintiff withdrew from its application all points within the states of Wisconsin, Texas, Arkansas, Kansas and Missouri and points within certain portions of Florida and Illinois; that plaintiff introduced, and the examiner received, evidence offered by the plaintiff in support of its application, and on or about May 13, 1937, the examiner submitted to the Commission and served upon the parties to the proceeding his proposed report and order, in which it was recommended that the Commission grant in part plaintiff's application and deny the rest thereof, whereupon, on or about May 26, 1937, before the Commission had acted upon the aforesaid recommended report and order, the plaintiff filed with the Commission its written application alleging that the evidence adduced by it at the hearing on February 15, 1937, was inadequate and insufficient to justify the issuance of the certificate prayed by it and asking that the proceeding be reopened in order that it might more fully prove its operations, etc.; that on or about June 18, 1937, the Commission granted plaintiff's application aforesaid and reopened said proceeding for further hearing; that the second hearing of the matter was had at Birmingham, Ala., August 20, 1937, at which plaintiff and protestants introduced additional evidence; that on or about November

30, 1937, the Commission examiner submitted his second recommended report and order, to which the plaintiff and [fol. 216] also the protestants in due time filed their respective exceptions and briefs; that said exceptions to the proposed report were duly considered by the Commission, and on or about July 10, 1940, the Commission, by its Division 5, made its final report and order, a true copy of which is attached to and made a part of the complaint herein, being marked Exhibit A thereto; that said decision of the Commission is officially reported in 24 M. C. C. (Motor Carrier Cases) 273; that in and by said report and order the Commission directed the issuance of a certificate to the plaintiff authorizing in part its operation as a common carrier as prayed in its application, but denying its application in all other respects. For specific information as to the exact respects in which said application was granted or denied, the Court is respectfully referred to said report and order.

That thereafter, to wit, on August 10, 1940, the plaintiff filed with the Commission its petition for a rehearing of its "grandfather" application under Section 206 and also for a consolidation of said proceeding upon rehearing with another proceeding growing out of another and subsequent application by plaintiff for a certificate under Section 207 of the Motor Carrier Act, and that, after consideration, the entire Commission denied said application by an order made October 1, 1940; that on or about October 16, 1940, the plaintiff filed another petition in which it prayed the reopening of said "grandfather" proceeding, which motion the Commission, by an order entered February 3, 1941, denied.

Further answering said paragraphs of the complaint, the Commission alleges and shows that throughout the course [fol. 217] of the proceedings above described, the plaintiff and all other parties to said proceedings were, and each of them was, afforded the full hearing provided for in and by the Interstate Commerce Act; that at the hearings aforesaid a large volume of testimony and other evidence bearing upon the issues involved in said proceedings was received and submitted to the Commission for its consideration; that said issues were fully argued and submitted to the Commission for its consideration, and that the Commission's report and order of July 10, 1940, include the Commission's findings of fact, decision, conclusions, orders and requirements in the premises made upon the evidence presented to it as shown in and by said report; that the find-

ings and conclusions set out in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings; that in making said report and order the Commission did not fail to consider any evidence which it should have considered, but considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition shown in the evidence which was relevant and material to the determination of the issues involved.

The Commission further alleges and shows that its report and order of July 10, 1940, was not and is not unreasonable, arbitrary, capricious, unlawful or in excess of the Commission's lawful powers and jurisdiction, and the Commission denies each of and all the allegations to the contrary contained in said complaint.

[fols. 218-219] Further answering said complaint, and particularly paragraph 6 thereof, the Commission admits that included in its report are the six isolated clauses set out verbatim in said paragraph of the complaint, but the Commission denies that said quoted portions of the report constitute a full, true or correct statement of the Commission's findings and conclusions in said proceeding and respectfully refers the Court to the complete report which is set out as Exhibit A to the complaint herein.

Further answering the complaint, and particularly paragraph 7 thereof, the Commission denies that its report and order of July 10, 1940, will cause plaintiff any irreparable injury or damage or any legal injury or damage whatever.

### III

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, in so far as they conflict either with the allegations herein stated or with those contained in the Commission's said report of July 10, 1940.

Wherefore the Commission prays that said complaint be dismissed.

Interstate Commerce Commission, by Nelson Thomas,  
Attorney, 3328 Interstate Commerce Bldg., Washington, D. C.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

*Duly sworn to by William E. Lee. Jurat omitted in printing.*

[fol. 220]

## DEFENDANTS' EXHIBIT No. 1

Certificate of the Secretary of the Interstate Commerce  
Commission

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Application, including Exhibits B, B-1-c, C, D, E, C-2, D-1 and D-3 (but exclusive of all other exhibits and supporting data), filed October 30, 1939 on Form B. M. C. 8;

Petition for amendment filed January 13, 1940; and

Report and Order of the Commission filed and entered January 3, 1941,

No. MC-42318 Sub-No. 1, Howard Hall Company, Inc., Eastern Territory Extension, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Commission this 11th day of April, A. D. 1941.

W. P. Bartel, Secretary of the Interstate Commerce  
Commission. (Seal affixed.)



## APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY—PROPERTY

(This form is to be used by applicants who propose, as common carriers of property, (1) to continue an operation, or the extension of an operation, in interstate or foreign commerce instituted between June 1, 1935, and October 15, 1935, inclusive; (2) to institute an operation in interstate or foreign commerce at any time subsequent to October 15, 1935; or (3) to extend an operation for which a separate application has been filed with or certificate issued by the Interstate Commerce Commission under the Motor Carrier Act, 1935.)

(Before answering, read *General Instructions* on last page. Numbers under line refer to *Special Instructions* on that page)

## BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of HOWARD HALL COMPANY, INC.

(Full and correct name)  
for a Certificate of Public Convenience and Necessity authorizing common carrier services to transportation of property in interstate or foreign commerce under the Motor Carrier Act, 1935 Docket No. 4-42318 SB-1

## APPLICATION

To the Interstate Commerce Commission, Washington, D. C.

## Applicant States:

I. That full and correct name of applicant is HOWARD HALL COMPANY, INC. *Sub A*

Business address 2809 Second Avenue, South, Birmingham (Street and number) (City)  
Jefferson Alabama (County) (State)

II. That applicant is a Corporation, <sup>(1)</sup> doing business or proposing to do business under the trade name or style of Howard Hall Co., Inc., <sup>(2)</sup> and that information respecting applicant is set forth in Exhibit A, attached hereto and made a part hereof.

III. That applicant herein applies for authority (1) to continue an operation <sup>(Check)</sup>, or the extension of an operation <sup>(Check)</sup> as a common carrier of property in interstate or foreign commerce, which operation or extension was instituted between June 1, 1935, and October 15, 1935, inclusive; (2) to institute such an operation at a time subsequent to October 15, 1935 <sup>(Check)</sup>; or (3) to extend an operation for which a separate application has been filed with or certificate issued by the Interstate Commerce Commission under the Motor Carrier Act, 1935 <sup>(Check)</sup>; and that a description of the operation or extension for which authority is sought herein and of the class or classes of property transported or to be transported, is set forth in detail in Exhibit B, attached hereto and made a part hereof.

IV. That applicant sets forth, in Exhibit C, attached hereto and made a part hereof, the facts and circumstances upon which applicant relies to establish that the public convenience and necessity require or will require the service for which application is herein made.

V. That applicant sets forth in Exhibit D, attached hereto and made a part hereof, facts and circumstances to show that applicant is fit, willing, and able properly to perform the service for which application is herein made and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder.

VI. That applicant has complied, with the order of the Commission relative to the service of this application and of notice of the filing thereof on interested parties, as shown in Exhibit E, attached hereto and made a part hereof.

VII. That applicant will submit such additional information in support of this application as the Commission may require.

Whereas, The applicant prays: That the Commission issue a Certificate of Public Convenience and Necessity authorizing applicant to engage in, or continue, the transportation of commodities generally with certain <sup>(State whether commodities generally, with exceptions.)</sup>

<sup>(Specify exception, or specify commodity only)</sup>  
in interstate or foreign commerce, over the route or routes or within the territory herein described.

II. That applicant is a Corporation, doing business or proposing to do business under the trade name or style of Howard Hall Co., Inc., and that information respecting applicant is set forth in Exhibit A, attached hereto and made a part hereof.

III. That applicant hereby applies for authority (1) to continue an operation \_\_\_\_\_, or the extension of an operation \_\_\_\_\_ as a common carrier of property in interstate or foreign commerce, which operation or extension was instituted between June 1, 1935, and October 15, 1935, inclusive; (2) to institute such an operation at a time subsequent to October 15, 1935 \_\_\_\_\_ or (3) to extend an operation for which a separate application has been filed with or certificate issued by the Interstate Commerce Commission under the Motor Carrier Act, 1935 \_\_\_\_\_; and that a description of the operation or extension for which authority is sought herein and of the class or classes of property transported or to be transported, is set forth in detail in Exhibit B, attached hereto and made a part hereof.

IV. That applicant sets forth, in Exhibit C, attached hereto and made a part hereof, the facts and circumstances upon which applicant relies to establish that the public convenience and necessity require or will require the service for which application is herein made.

V. That applicant sets forth in Exhibit D, attached hereto and made a part hereof, facts and circumstances to show that applicant is fit, willing, and able properly to perform the service for which application is herein made and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder.

VI. That applicant has complied with the order of the Commission relative to the service of this application and of notice of the filing thereof on interested parties, as shown in Exhibit E, attached hereto and made a part hereof.

VII. That applicant will submit such additional information in support of this application as the Commission may require.

Witnessed, The applicant prays: That the Commission issue a Certificate of Public Convenience and Necessity authorising applicant to engage in, or continue, the transportation of commodities generally with certain exceptions.  
(State whether commodities general, with certain exceptions, or specific)

In Interstate or foreign commerce, over the route or routes or within the territory herein described.

Dated this 15<sup>th</sup> day of October 1983

Howard Hall Co., Inc.

By Howard Hall / (Title) President

STATE of Alabama }  
County of Jefferson }

Howard Hall makes oath and says that he is the President  
of the Howard Hall Company, Inc. that he is authorized on the part of

(Name of applicant)

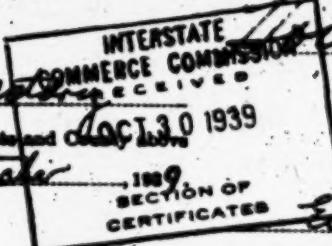
applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

#### References and sources to follow up on

Public in aid for the State and County above OC 130 193

named this - 37 day 1st State 1000

SECTION OF  
CERTIFICATE



### My concentration exercise

Eugene S. Seale  
March 1943

## EXHIBIT B

## Howard Hall Company, Inc.

(Name of applicant)

## DESCRIPTION OF OPERATIONS

## 1. Describe the operations covered by this application as follows:

## (a) Operations over a regular route or routes and between fixed terminals:

(1) Between \_\_\_\_\_ and \_\_\_\_\_, as follows

(i) From \_\_\_\_\_ to \_\_\_\_\_, via Highway \_\_\_\_\_  
(Indicate interchange points on route) (See U. S. highway number whenever applicable; otherwise, state or county highway number)

(ii) From \_\_\_\_\_ to \_\_\_\_\_, via Highway \_\_\_\_\_

(iii) From \_\_\_\_\_ to \_\_\_\_\_, via Highway \_\_\_\_\_

(iv) From \_\_\_\_\_ to \_\_\_\_\_, via Highway \_\_\_\_\_

(v) From \_\_\_\_\_ to \_\_\_\_\_, via Highway \_\_\_\_\_

(Report on above for each route and party thereof. For example, in Note 6 on last page. Indicate in each case whether return route corresponds to those above described. If not, furnish similar description for return route. FOLIO may show route and route.)

Show also, for each route separately:

(2) The intermediate and off-route points served or proposed to be served by applicant in connection with transportation in interstate or foreign commerce \_\_\_\_\_ (4)

(3) The class or classes of property transported or proposed to be transported by applicant in interstate or foreign commerce, whether (a) commodities generally, with certain exceptions, \_\_\_\_\_

(State exceptions, either generally or by their general nature)

or, (b) special commodities \_\_\_\_\_ (State class or classes of commodities)

(4) The present or proposed time schedules (attach copy and identify as Statement 31-1-(a)-4).

(5) The extent, if any, to which operations covered by this application are or will be seasonal and the months of the normal operating season \_\_\_\_\_

(6) The present or proposed interchange arrangements:

Point of interchange	Name and address of carrier with which traffic is or is to be interchanged	Interchange arrangements	
		Physical interchange	Date
		(6)	(7)

(7) If application covers existing operations, date on which operations were instituted:

(8) If such operations were instituted by someone other than applicant, show by whom instituted and manner and date of applicant's acquisition of such operations. Copy of lease agreement, court order, articles of consolidation or merger, or other evidence of applicable acquisition of such operations. Identify as Statement B-1-(a)-8.

COMMERCIAL COMMISSION

RECEIVED

OCT 13 1959

(9) If any of the operations covered by this application are conducted or are proposed to be conducted by applicant under lease or operating agreement with another, or if conducted by another under lease or operating agreement with

applicant, give name and address of such other party.

(Attach copy of such lease or agreement, identified as Statement B-1-(a)-9.) Also state whether authority to lease or contract to operate has been applied for under Section 212, Motor Carrier Act, 1935

(Yes or No)

(10) Operations solely within municipal areas:

If operations covered by this application are conducted or are proposed to be conducted solely within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, indicate the area within which such operations are conducted or proposed to be conducted and set forth all information requested in (a) (3), (5), (6), (7), (8), and (9) above.

(ovma)

2-528

## EXHIBIT B—Concluded

(c) Operations other than over regular routes and between fixed terminals or within municipal areas:

(1) Location of applicant's headquarters \_\_\_\_\_

(2) Place or places at which or the territory within which applicant obtains, or proposes to obtain, the main volume of its traffic. (Indicate clearly). See attached Exhibit B - 1 (c) for full

Description of commodities and territory applied for herein.

(3) Place or places to which or territory within which applicant transports, or proposes to transport, such traffic. (Indicate clearly) \_\_\_\_\_

(4) The class or classes of property transported or proposed to be transported by applicant in interstate or foreign commerce, whether (a) commodities generally, with certain exceptions,

(State exceptions, either specifically or by their general nature) \_\_\_\_\_

(or (b) special commodities) \_\_\_\_\_ (State class or classes of commodities) \_\_\_\_\_

(5) If the answers to the preceding questions do not adequately and accurately describe the operations covered by this application, describe such operations clearly and in detail \_\_\_\_\_

(6) Furnish, in addition to the foregoing, a map clearly showing territory served or to be served. Identify as Map B-1-(c)-(6).

(7) Answer (a) (5), (6), (7), (8), and (9), so far as applicable, in an attached statement, identified as Statement B-1-(c)-(7).

## (d) Motor vehicle equipment and other facilities:

(1) The motor vehicle equipment used or proposed to be used by applicant in the operations covered by this application is as follows:

Type	Makes	Year of model	Manufacturers' rated capacity	Length	Width	Height	Type of body
25							

Applicant now operates 25 trucks which are registered with the Commission.

)

(2) If any of the equipment set forth in (1) above is not or will not be owned by applicant, give the information indicated below:

Number of units	Description of units	Name and address of owner	Basis of payment for use
(2)			

Applicant now operates 26 trucks which are registered with  
the Commission.

(2) If any of the equipment set forth in (1) above is not or will not be owned by applicant, give the information indicated below:

Number of units	Description of units	Name and address of owner	Basis of payment for use
(3)			

(a) Description and location of other property, except office equipment, used or proposed to be used in the performance of the transportation service covered by this application, such as dock and terminal facilities, garages, machine shops, etc.

.....  
.....  
.....

3. If applicant holds a certificate of public convenience and necessity or a permit from the Interstate Commerce Commission or has applied for such a certificate or permit on Form B. M. C. 1, give the certificate or permit number, or the docket number of a pending application, and set forth any facts required to show the relation between the operations covered by such certificate, permit, or application and those covered by the present application.

Docket #42318. This application covers some grandfather claims and other operations instituted between June 1, 1935 and October 15, 1935.

EXHIBIT B-1-c.

The applicant applies for authority to operate as a common carrier of commodities generally over irregular routes, as follows:

(a) Between Birmingham, Alabama and points in Alabama within a radius of 100 miles of Birmingham and points and places in the States of North Carolina, South Carolina, Georgia, Louisiana, Mississippi, all points in Florida north of and including Tampa and Lakeland and all points in Tennessee east of U.S. Highway 31, including all points on said highway.

(b) Between Birmingham, Alabama and points in Alabama within a radius of 100 miles of Birmingham and the following points:

- (1) Virginia - All points and places therein.
- (2) District of Columbia - All points and places therein.
- (3) Maryland - Baltimore commercial zone, Cumberland, Hagerstown.
- (4) West Virginia - Fairmont, Parkersburg, Mannington.
- (5) Pennsylvania - Philadelphia commercial zone, Reading, Spring City, Norristown, Pottsville, Fleetwood, Easton, Conshohocken, Lehighton, Macungie, Denver, Red Hill.
- (6) Delaware - Wilmington.
- (7) New Jersey - Trenton, Newark, Marcus Hook, Kearney, Patterson, Elizabeth, Camden, Palmyra.

(4) West Virginia - Fairmont, Parkersburg, Mannington.

(5) Pennsylvania - Philadelphia commercial zone,  
Reading, Spring City, Norristown,  
Pottsville, Fleetwood, Easton,  
Conshohocken, Lehighton, Macungie,  
Denver, Red Hill.

(6) Delaware - Wilmington.

(7) New Jersey - Trenton, Newark, Marcus Hook,  
Kearney, Patterson, Elizabeth,  
Camden, Palmyra.

(8) New York - New York City commercial zone.

Where specific points are named in the above application, authority is sought to serve a radius of five miles thereof.

The above application covers numerous points and places applied for in the grandfather application which has been heard before an Examiner and is now pending before Division Five of this Commission. This application is not to be construed as an admission that such applied for points are not properly included in the grandfather application. On the contrary, applicant believes that it is entitled to practically all of the points applied for in this application as a result of operations beginning June 1, 1935 or operations begun between June 1, 1935 and October 15, 1935, but this application is filed because at the time of the hearing on its grandfather application proof of certain operations was lacking, which applicant now believes can be furnished the Commission at the hearing on this application BMC-8.

SECTION OF  
CERTIFICATE

EXHIBIT C

Howard Hall Company, Inc.  
(Name of applicant)

PUBLIC CONVENIENCE AND NECESSITY

Set forth the facts and circumstances upon which applicant relies to establish that the service covered by this application is or will be required by the present or future public convenience and necessity, including:

1. The names and addresses of all motor carriers and all carriers by rail and water, known to applicant, with whose service the operations described in this application are or will be directly competitive.
2. The reasons, briefly and clearly stated, why the transportation service covered by this application is or will be required by the present or future public convenience and necessity.

1. Southern Railway	Washington, D. C.
L. & N. Railway	Louisville, Ky.
Seaboard Air Line Railway	Norfolk, Va.
Federal Barge Lines	Mobile, Ala.
Pennsylvania Railroad	Philadelphia, Pa.
Jack Cole Co., Inc.	Birmingham, Ala.
Alabama Highway Express	Birmingham, Ala.
Malone Freight Lines	Birmingham, Ala.
Dixie Freight Lines	Atlanta, Georgia
United Motor Freight Terminal	Birmingham, Ala.
Georgia Motor Express	Atlanta, Georgia
Motor Terminal and Transportation Co.	Montgomery, Ala.
Southern Motor Express, Inc.	Birmingham, Ala.
Horton Motor Lines	Charlotte, N. C.
Atlantic Motor Lines	Highpoint, N. C.
Roadway Express	Akron, Ohio

2. See Attached Exhibit C-2

**EXHIBIT D**  
**QUALIFICATIONS OF APPLICANT**

State the facts and circumstances upon which applicant relies to show that applicant is fit, willing, and able properly to perform the service for which application is herein made and to conform to the provisions of the Motor Carrier Act, 1935, and the requirements, rules, and regulations of the Commission thereunder, including:

1. A detailed statement of applicant's assets and liabilities on the date of this application. (Attach and identify as Statement D-1.)
2. If applicant has been engaged in motor carrier operations prior to the date of this application, furnish, if available, an income and profit and loss statement for the year or 6 months immediately preceding such date, or the period of applicant's operations, if less than 6 months. (Attach and identify as Statement D-2.)
3. A statement containing a brief description of the experience of the principal officers and operating personnel of applicant's present or proposed organization. (Attach and identify as Statement D-3.)
4. Any other facts relevant to the ability of applicant properly to perform the service covered by this application:

.....  
.....  
.....

**EXHIBIT E**  
**CERTIFICATE OF SERVICE**

I, <u>Howard Hall</u> <small>(Name of officer)</small>	<u>President</u> <small>(Title of officer)</small>
hereby certify that upon the <u>26th</u> <small>day of <u>July</u>, 19<u>50</u></small>	of the applicant, do
the Boards, Commissions, or officials (or the Governor who is in <u>Ga.</u> , <u>Ala.</u> , <u>Fla.</u> , <u>N.C.</u> , <u>S.C.</u> , <u>Tenn.</u> , <u>Va.</u> , <u>W. Va.</u> in which States applicant operates or proposes to operate, by delivering in person or by registered mail, a true, correct, and complete copy of this application to each thereof at the following addresses:	RECEIVED INTERSTATE COMMISSION RECEIVED 1950
<u>CERTIFICATES</u>	

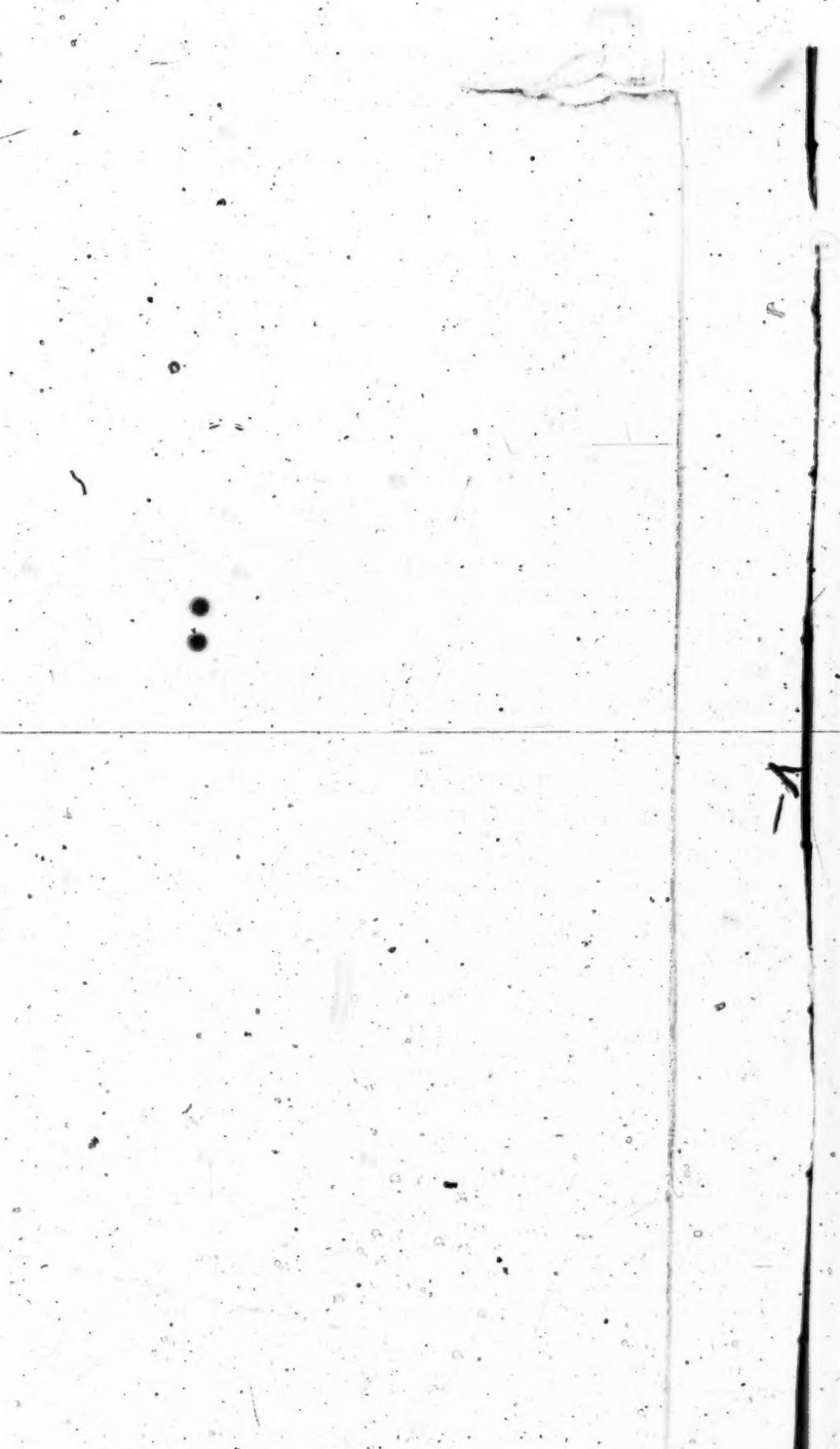
See Attached Exhibit E  
(Name of Board)

(Address)

I verily certify that I served a notice of the filing of this application, as required by Form B. M. C. 15, by delivering in person or by registered mail a copy thereof to each of the carriers named in answer to Item 1 of Exhibit C of this application.

Howard Hall  
(Signature)

62



[fol. 226]

## EXHIBIT E

Alabama Public Service Commission, Montgomery, Alabama.

Mississippi Railroad Commission, Jackson, Mississippi.

Louisiana Public Service Commission, Baton Rouge, Louisiana.

Florida Railroad Commission, Tallahassee, Florida.

Georgia Public Service Commission, Atlanta, Georgia.

Tennessee Railroad and Public Utilities Commission, Nashville, Tennessee.

North Carolina Utilities Commission, Raleigh, North Carolina.

South Carolina Public Service Commission, Columbia, South Carolina.

Virginia State Corporation Commission, Richmond, Virginia.

West Virginia Public Service Commission, Charleston, West Virginia.

Maryland Public Service Commission, Baltimore, Maryland.

Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

District of Columbia Public Utilities Commission, Washington, D. C.

New Jersey Board of Public Utility Commissioners, Trenton, New Jersey.

New York Public Service Commission, Albany, New York.

Governor of Delaware, Dover, Delaware.

[fol. 227]

## EXHIBIT C-2

As heretofore set out in Exhibit B-1-c, applicant believes that it is entitled to a large number of the rights sought for in this application because of operations conducted prior to June 1, 1935 or between June 1, 1935 and October 15, 1935, but its grandfather case has now been heard and is pending before Division Five and because of lack of proof in that hearing applicant files this application to substantiate the rights contended for herein.

Applicant has been engaged in operations as an irregular common carrier since 1934 and has rendered extensive service to the shippers of Birmingham and those located within 100 mile radius thereof. By operating to such points as applied for herein, applicant can give direct and expedited

service to the shippers of the territory which can not be given by the regular route common carriers due to the fact that practically all the points applied for are not served directly by any one carrier but would have to be served by several connecting common carriers over irregular routes. Some points applied for have no truck service whatsoever.

[fol. 228]

## EXHIBIT D-1

Howard Hall Company, Inc.  
Birmingham, Alabama

Balance Sheet  
As at June 30th, 1939

Assets	
Current	
Cash in Bank.....	\$14,599.92
Cash in Office.....	335.82
<b>Total Cash.....</b>	<b>14,935.74</b>
Revenue Accounts Receivable.....	\$8,294.61
Employees Accounts Receivable.....	119.32
Due from Tire Store.....	649.09
<b>Total Accounts Receivable.....</b>	<b>9,063.02</b>
<b>Total Current Assets.....</b>	<b>23,998.76</b>
Fixed	
Truck equipment.....	\$31,080.10
Less: Reserve for Depreciation.....	18,875.59
<b>Trailer equipment.....</b>	<b>12,204.51</b>
Less: Reserve for Depreciation.....	7,502.51
<b>Office and shop equipment.....</b>	<b>7,135.32</b>
Less: Reserve for Depreciation.....	10.00
<b>Automobiles.....</b>	<b>175.00</b>
Less: Reserve for Depreciation.....	581.08
<b>Total Fixed Assets.....</b>	<b>924.14</b>
<b>Deferred and Prepaid Items.....</b>	<b>20,438.97</b>
<b>Total Assets.....</b>	<b>1,459.96</b>
<b>\$45,897.69</b>	
Current	Liabilities
Equipment Lien Notes Payable.....	\$1,594.08
Miscellaneous Accounts Payable.....	5,031.62
Accrued Capital Stock Tax.....	90.00
Accrued Taxes.....	722.96
<b>Total Current Liabilities.....</b>	<b>7,438.66</b>
Capital and Surplus	
Capital Stock Issued.....	2,000.00
Paid-in Surplus.....	1,294.51
Earned Surplus less Dividends.....	35,164.52
<b>Total Capital and Surplus.....</b>	<b>38,459.03</b>
<b>Total Liabilities.....</b>	<b>\$45,897.69</b>

[fol. 229]

## EXHIBIT D-3

Howard Hall, President and General Manager of Howard Hall Company, Inc., has been engaged as a common carrier over irregular routes since early 1934 and since that time has steadily increased the profits of the company. He is thoroughly familiar with the irregular route common carrier type of business, as his balance sheet indicates.

[fol. 230] BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Howard Hall Company, Inc.

Docket No. 42318, Sub. 1

Comes Now Howard Hall Company, Inc., applicant in the above styled docket, and files this its petition for amendment to its application for extension heretofore filed on Form BMC-8 and for petition respectfully says:

1

On October 30, 1939 applicant filed an application for extension of its operations. This application covered operations which were begun prior to June 1, 1935 and operations instituted between June 1, 1935 and October 15, 1935 and also some new operations. The application for the operation instituted prior to October 15, 1935 was applied for as a precautionary measure because applicant feared it had not submitted sufficient evidence of these operations in the hearing on its grandfather application but that applicant now was in a position to produce additional evidence in connection with these operations.

2

Through oversight, applicant failed to include in its grandfather application and the application for extension heretofore filed on October 30, 1939 a request for operating authority between Mobile, Alabama on the one hand and Montgomery and Birmingham, Alabama on the other. Applicant claims to have conducted such operations prior to [fol. 231] June 1, 1935 but wishes to include application for this territory in its present application for an extension.

Applicant requests authority to amend Exhibit B-1-c of its application filed on October 30, 1939 so as to include the following paragraph, which should follow paragraph (b) thereof:

(c) Between Mobile, Alabama on the one hand and Montgomery and Birmingham, Alabama on the other.

Wherefore, applicant prays that said amendment be allowed and be made a part of its application on Form BMC-8 heretofore filed on October 30, 1939.

Allan Watkins, Attorney for the Applicant.

Post Office Address: 1403 Citizens & Southern National Bank Building, Atlanta, Georgia.

STATE OF GEORGIA,

County of Fulton:

Personally appeared before the undersigned officer, duly authorized to administer oaths, Howard Hall, who, after being duly sworn deposes and says that he is the president of Howard Hall Company, Inc. and that he is authorized on the part of said corporation to verify and file with the Interstate Commerce Commission this amendment to its application; that he has carefully examined all statements contained in such amendment and that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and [fol. 232] correct to the best of his knowledge, information and belief.

Howard Hall.

Sworn to and subscribed before me this 11th day of January, 1940. Lucille H. Printup, Notary Public, Georgia, State at Large.

#### Certificate of Service

I hereby certify that I have served a copy of this amendment by mailing copy of the same to all carriers set forth in Exhibit C-1 of the application heretofore filed and have also served copy of the same upon all Boards or Commissioners of the states set forth in Exhibit E of the application heretofore filed.

Allan Watkins, Attorney for Howard Hall Company, Inc.

[fol. 233] This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-42318 (Sub-No. 1)

HOWARD HALL COMPANY, INC., EASTERN TERRITORY EXTENSION

Submitted September 20, 1940. Decided January 3, 1941

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of marble from Gantts Quarry, Ala., to points in North Carolina, South Carolina, Virginia, New Jersey, Florida, Pennsylvania, New York, Maryland, Delaware, and the District of Columbia, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions and application denied in all other respects.

*Allan Watkins and Edgar Watkins for applicant.*

*James B. Smiley, Jr., Frank X. Masterson, J. D. Lawson, Frank D. Hollifield, John M. Miller, C. E. Walker, J. W. Coker, D. H. Bagley, J. F. Kirkman, Chas. B. Skimerton, L. C. Adcock, J. N. Ogden, William C. Burger, and James W. Wrape for protestants.*

Report of the Commission

Division 5, Commissioners Lee, Rogers, and Patterson

By Division 5:

Exceptions were filed by applicant and protestants to the order recommended by the examiner, and a motor carrier protestant and certain rail protestants replied to those of applicant. Our conclusions differ somewhat from those recommended.

By application filed October 30, 1939, as amended, Howard Hall Company, Inc., of Birmingham, Ala., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with cer-

tain exceptions, between Birmingham and points within 100 miles thereof, on the one hand, and, on the other, all points in Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Virginia, District of Columbia, those in Florida north of and including Tampa and Lakeland, those in Tennessee on and east of U. S. Highway 31, and certain specified points in Delaware, Maryland, New Jersey, New York, and Pennsylvania, and also between Mobile, Ala., on the one hand, and Birmingham and Montgomery, Ala., on the other; all over irregular routes. Motor and rail carriers operating in the same general territory oppose the application.

In *Howard Hall Co., Inc., Common Carrier Application*, 24 M. C. C. 273, we found that applicant was on June 1, 1935, and continuously since that time had been, in bona fide operation as a common carrier by motor vehicle, over [fol. 234] irregular routes, of (a) general commodities, with certain exceptions, between Birmingham and points within 10 miles thereof, on the one hand, and, on the other, all points in Georgia, Mississippi, North Carolina, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 192 to Melbourne, and (b) specified commodities, from and to certain points in Alabama, Louisiana, Ohio, Tennessee, and West Virginia. By the instant application, authority is sought to operate from or to a 100 mile area around Birmingham in lieu of the authorized 10 mile area, and, in addition, to enlarge the territorial scope to embrace the territory outlined in the preceding paragraph.

Applicant operates 26 complete units of equipment, consisting of tractors and trailers, and closed and open type vans, some of which are 30 feet in length. It now serves many of the points included herein; presumably on the basis that operations to such points were instituted during the so-called interim period. Though this application was filed subsequent to February 12, 1936, applicant's timely filed "grandfather" application covered all of the territory included herein. Accordingly, it might be said that the instant application is, in effect, an amendment on a proper form of the timely filed "grandfather" application. Such operations as were commenced during such period, i. e., between June 2, 1935, and October 15, 1935, both inclusive,

and which have been conducted continuously since have therefore been lawful.

In support of its application, applicant relies mainly on four exhibits covering transportation performed by it between the various points included herein. In some instances, these exhibits show shipments transported on or before June 1, 1935, but since applicant's "grandfather" rights, as stated above, have been decided,<sup>1</sup> no consideration will be given herein to any shipments transported on or prior to June 1, 1935, nor to any shipments moving between points authorized in such other proceeding.

During the interim period, i. e., between June 2, 1935, and October 15, 1935, inclusive, applicant transported three shipments of rugs from Wilmington, Del., to Birmingham, but did not serve any point in Delaware from the fall of 1935 until the fall of 1936. As to Georgia, one shipment of sugar was transported from each of the points of Port Wentworth and Savannah, Ga., to Montgomery, Ala., one shipment of furniture from Tarrant City, Ala., to Athens, Ga., and one shipment of felt from Fairfield, Ala., to Reidsville, Ga., but no points in Georgia were served in 1936. Applicant also transported one shipment of tomatoes from Baltimore, Md., to Birmingham; two shipments of paper bags from Pascagoula, Miss., to Montgomery; one shipment of scrap tires from Birmingham to Trenton, N. J.; five shipments of tires and tubes from Trenton to Birmingham, and one shipment of furniture from Birmingham to Pal-[fol. 235] myra, N. J.; three shipments of butter between New York City, N. Y., and Birmingham; one shipment of pianos from New York City to Birmingham; and two shipments of furniture between Birmingham and New York City; two shipments of cotton yarn from Sylacauga, Ala., to Swannanoa, N. C.; two shipments of paper from Hartsville, S. C., to Selma, Ala.; and one shipment from each of the points of Front Royal, Richmond, Suffolk, and Winchester, Va., to Birmingham, consisting of apple butter, tile, peanuts, and apple sauce, respectively, and nine shipments of cloth from Danville, Va., to Birmingham. In respect of Tennessee, applicant transported four shipments of cotton yarn from Sylacauga, one to Knoxville, Tenn., and

<sup>1</sup> Applicant has filed a petition for reconsideration in No. MC-42318 and the effective date of the denial order in that case has been postponed.

the other three to Chattanooga, Tenn., but there was only one shipment to or from Tennessee points in 1936.

Applicant also transported, during the interim period, a total of approximately 72 shipments from or to points in Pennsylvania consisting of 31 of cotton yarn, 10 of springs, nine of cloth, eight of batteries, four each of cotton cones and oil, two each of radios and cleaning compound, and one each of jelly and laundry supplies. Forty-eight of these shipments moved to or from Philadelphia and Reading, Pa., with the remainder, consisting of from one to six shipments each, moving to or from Denver, Fleetwood, Gaston, Lehighton, Macungie, Norristown, Pittsburgh, Pittsville, Red Hill, and Spring City, Pa. Twenty-seven originated at or were destined to Birmingham, 23 to Sycamore, Ala., 18 to Sylacauga, three to Jacksonville, Ala., and one to Gadsden, Ala.

As stated, applicant requests authority to transport general commodities, over irregular routes, throughout a large territory, and has predicated its case principally on the exhibits which, to the extent that they show operations during the interim period, are discussed above. Applicant contends that it has always held itself out to transport general commodities between the points included herein, and that it should be authorized so to operate. Under the provisions of the Interstate Commerce Act, however, we have no power to grant a certificate covering the authority sought by applicant except upon evidence that the service in question is or will be required by the present or future public convenience and necessity and that applicant is fit, willing, and able properly to perform such service. Although no one questions applicant's fitness to perform the proposed operation, protestants contend that public convenience and necessity do not require it.

If we assume that the transportation of the various commodities set forth above would bring applicant's operations within the category of a general commodity hauler, then certainly authority so extensive as that here sought could be granted only on a most substantial showing of public convenience and necessity. To do otherwise would create the very ills which regulation is designed to alleviate. The evidence concerning applicant's past operations wholly fails to establish a need for its services in the transportation of general commodities in the large area claimed. Indeed, it fails to indicate a continuing need or demand for

applicant's service with respect to even specific commodities, for the reason that of the commodities transported [fol. 236] during the interim period, the only commodity transported continuously since that time has been springs from Philadelphia to Birmingham. Applicant, to a large extent, has changed the territory served and the commodities transported from time to time. For example, during 1937, applicant began transporting mayonnaise in large quantities from Jacksonville, Fla., to various points in Alabama; flavoring syrup from Birmingham to points other than those authorized in its "grandfather" proceeding; and canned goods from points in Tennessee to destinations in Alabama. In our opinion, it is necessary, therefore, to rely almost entirely on the testimony of the shipper witnesses concerning the need, if any, for applicant's services.

Four shippers' witnesses testified in support of applicant's proposed operation. A manufacturer of felt base rugs has been using applicant's service from Wilmington to Birmingham since October 1936. It also used such service to Montgomery but had not shipped to that point in over a year prior to the hearing. Before this company used applicant's service, shipments were made by water to Mobile, thence by truck, but because of delay and damage to merchandise, the change was made to applicant. No other motor carrier has been used from Wilmington because applicant's service has been completely satisfactory. By the use of applicant's service, an order can be mailed on a Saturday, the rugs are picked up on a Monday or Tuesday, and delivered on Thursday or Friday. Expedited service is needed to keep a balanced stock on hand. Shipments are made two to four times a month and in quantities of at least 16,000 pounds. This shipper, however, has never inquired as to whether it can get the same service from other carriers.

A manufacturer of tires and tubes at Conshohocken, Pa., has used applicant's service in the transportation of tires and tubes from Conshohocken to Birmingham since the fall of 1936, and in the transportation of tire fabric from West Boylston, Ala., to Conshohocken, apparently since 1939. Applicant's service has been satisfactory, but this witness stated that the principal reason for using such service is that applicant's president is financially interested in the manufacturer's tire distributorship at Birmingham.

Applicant has transported marble, in shipments of 12,000 pounds or more, from Gantt's Quarry, Ala., near Sylacauga, to various points in the territory for the past two or three years. This marble is used in the interior of buildings, is of "thin stock", and is easily subject to breakage. Less-than-truckload shipments are specially packed and are handled satisfactorily by regular route common carriers. When transported in truckload and carload quantities, the marble is packed in "A" frames and braced in the trucks or cars. A truckload of 12,000 pounds packed in the same manner as for less-than-truckload shipments would cost \$50 to \$100 more than packed for truckload movement. Shipments are made to practically all points where construction is in progress, but are not made regularly to any one point. This shipper stated he had a need for applicant's services to points in Delaware, Florida, Louisiana, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, and the District of Columbia.

[fol. 237] Applicant also has served a manufacturer of flavoring syrup for the past three years. Shipments are usually in truckloads weighing 15,000 pounds or more and are transported from Birmingham to eastern points. The witness for this shipper expressed the opinion that when shipments of syrup in barrels are interchanged, there is a possibility of damage to the barrels causing them to leak. Contents of a leaking barrel cannot be used until analyzed due to possible contamination. At the present time, the shipper also uses rail and other motor carriers, but prefers applicant's service allegedly because it is better and results in fewer damage claims.

Representatives of five protestant motor carriers testified as to the service rendered by their respective companies and, in addition, protestants also introduced in evidence an exhibit showing motor carriers serving, either directly or through interchange, Birmingham, Montgomery, and the other principal points in the territory included in this application.

One protestant operates a regular daily schedule between Atlanta, Birmingham and Montgomery, interchanging at Birmingham for Louisiana and Mississippi points and at Atlanta for northern points. This carrier transports freight for the flavoring syrup manufacturer mentioned above; receives regular shipments of rugs in truckloads

at Atlanta, apparently through interchange, destined to Birmingham and Montgomery; gives third morning delivery out of Baltimore, Philadelphia, and New York City; and operates a number of pieces of equipment empty out of Birmingham and Montgomery because outbound tonnage from those points is less than that inbound. Some of the other protestants, one of which now transports marble in less-than-truckload lots from Sylacauga to points served by it on its regular route for the same shipper that applicant serves, propose by the interchange of trailers to transport marble in truckload lots to points in Louisiana and Mississippi as well as to points not included in this application.

From the foregoing, it is apparent that there is no convincing evidence that public convenience and necessity require applicant's operation in the transportation of any commodity with the possible exception of marble. Certainly there has been no showing as to a need for the transportation of general commodities. In respect of the transportation of rugs it should be noted that at least one motor carrier protestant is providing reasonably adequate service to Birmingham and Montgomery; that such carrier transports rugs; and that the shipper desiring applicant's service in the transportation of such commodity has never inquired as to whether it can get the same service from other trucking companies although the witness for this shipper stated that, if other carriers could give the same service as applicant, it would be sufficient. As to shipments of flavoring syrup, applicant has served Wilmington, Del., Baltimore, Md., and Lynchburg, Norfolk, Roanoke, Richmond, and Winchester Va., but the shipper is not sure that it needs applicant's service to Wilmington; rail service is satisfactory. This shipper also uses other carriers to points south of Wilmington, which service on less-than-truckload shipments has been satisfactory. However, as to the transportation of marble, there is no showing that protestants can or have provided reasonably satisfactory [fol. 238] service except to points in Louisiana and, although the application does not cover all points in certain States, we will consider it amended to include all such points, as the shipper testified that he never knew where a construction job would be and that he shipped to all construction jobs.

The burden of proof, of course, is upon applicant to show affirmatively that the proposed operation will serve a useful public purpose responsive to a public demand or need and that the public need cannot or will not be met as well by existing carriers. This, except in respect of the transportation of marble, applicant has failed to do. We have consistently found that existing carriers are entitled to handle the traffic available unless it is shown that there is a deficiency in the existing service. Existing carriers with established rights to serve points in this territory operate, it is true, principally over regular routes, but, as we heretofore have stated on numerous occasions, such regular route carriers are expected to maintain regular service for the movement of freight in whatever quantities offered and they cannot operate economically and efficiently if applicant or other carriers are permitted to invade such routes for the sole purpose of "handling the cream of the traffic available thereon in so-called irregular-route service." Accordingly, this application, with the one exception mentioned above, must be denied.

We find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle of marble, in interstate or foreign commerce, from Gantt's Quarry, Ala. (near Sylacauga, Ala.), to points in North Carolina, South Carolina, New Jersey, Virginia, Florida, Pennsylvania, New York, Maryland, Delaware and the District of Columbia over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the provisions of the act and our rules and regulations thereunder; that a certificate authorizing such operations should be issued; that in all other respects the application should be denied; and that applicant should be required to cease and desist from any and all such operations as were instituted between June 2, 1935, and October 15, 1935, inclusive.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein and requiring applicant to cease and desist from all operations embraced in this application except to the extent authorized.

Commissioner Lee did not participate in the disposition of this proceeding.

[fol. 239]

## Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 3rd day of January, A. D. 1941.

No. MC-42318 (Sub.-No. 1)

Howard Hall Company, Inc.,  
Eastern Territory Extension

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

*It is ordered*, That said application, except to the extent granted in said report, be, and it is hereby, denied effective March 3, 1941.

*And it is further ordered*, That applicant be, and it is hereby, notified and required to cease and desist on or before March 3, 1941, from all operations under the said application, No. MC-42318 (Sub-No. 1), as a motor carrier, in interstate or foreign commerce, instituted between June 2, 1935, and October 15, 1935, inclusive, except to the extent authorized in said report.

By the Commission, division 5.

W. P. Bartel, Secretary.

[fol. 240]

## Copy

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action. No. 5215

HOWARD HALL COMPANY, INC., Plaintiff,  
vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION, Defendants

Before McCord, Circuit Judge, and Kennamer and  
Murphree, District Judges

OPINION—Filed April 17, 1941

McCORD, Circuit Judge:

The petitioner, Howard Hall Company, Inc., is an Alabama corporation operating as a motor carrier with offices

and principal place of business in Birmingham, Alabama. On February 11, 1936, it filed application with the Interstate Commerce Commission for a certificate of public convenience and necessity under the "grandfather clause" of Section 206(a) of the Motor Carrier Act of 1935, 49 U. S. C. A. § 306 (a).

The carrier sought a certificate authorizing "continuance of operation in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson."

The application was filed and docketed by the Interstate Commerce Commission and a hearing was held before a trial examiner on February 15, 1937. Rail and motor carriers appeared in opposition to the application. At this first hearing the application was amended by eliminating therefrom all points in Wisconsin, Texas, Arkansas, Kansas, Missouri, and points in Florida south of Tampa and Lakeland, and [fol. 241] points north of Chicago. The Examiner issued a recommended report and order on May 13, 1937, but, on motion of Howard Hall Company, Inc., the report was withdrawn and a further hearing set for August 20, 1937. After the second hearing and on November 30, 1937, the Examiner issued his report and order recommending that certain rights be granted to the applicant. Exceptions to the report were filed by the carrier, and on July 10, 1940, Division 5 of the Interstate Commerce Commission handed down its report and decision in the case. It found that the applicant had not served "enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application." After reviewing the evidence before it the Commission further found that the applicant "on June 1, 1935, and continuously since that time, has been, in *bona fide* operation, in interstate or foreign

commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, . . . . . between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on the north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 92 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Chattanooga and Birmingham; all over irregular routes; that by reason of such operation it is entitled to a certificate authorizing the continuance thereof; and that the application in all other respects should be denied." Howard Hall Co., Inc., Common Carrier Application, 24 M. C. C. 273.

The order entered pursuant to the decision was to become effective on August 31, 1940, but the carrier filed application for rehearing and redetermination; and the Commission [fol. 242] from time to time postponed the effective date of the order until February 3, 1941, when a final order of denial was entered. Thereafter, on February 28, 1941, under the provisions of 28 U. S. C. A. §§ 41 (28) 43-48, Howard Hall Company, Inc., filed petition in this court to enjoin, set aside, and render ineffective that portion of the Commission's order which denied part of its application for a "grandfather" certificate. The Interstate Commerce Commission intervened as a party defendant under the provision of 28 U. S. C. A. § 43(a). A court of three judges was convened as required by statute, 28 U. S. C. A., § 47, and a hearing was held in Birmingham on April 14, 1941.

By stipulation and agreement of the parties and their respective counsel all issues presented by the petition are to be disposed of in this one proceeding and the case is, therefore, to be now decided upon its merits:

In a court review of an order of the Interstate Commerce Commission the range of issues is narrow. We are confined to a determination of whether or not the Commission's order violates the Constitution, exceeds the power delegated by statute, or is an exercise of power so arbitrary as virtually to transcend the authority conferred. Of such cases

the Supreme Court recently said, "Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes uncontested." *Rochester Telephone Corp. v. United States*, 307 U. S. 125; *United States v. Maher*, 307 U. S. 148; *I. C. C. v. Ill. Cent. R. Co.*, 215 U. S. 452; *Commerce*, 11 Am. Jur. §§ 172-174, p. 142, et seq.; *Commerce*, 15 C. J. S. § 148, p. 554, et seq.

Under the "grandfather clause" of the Motor Carrier Act the applicant, to be entitled to a certificate of public convenience and necessity, must have been engaged in "*bona fide*" operation as a motor carrier on June 1, 1935, "over the route or routes or within the territory for which application is made and has so operated since that time." In the determination of this fact question the weight of the evidence is for the Commission and not for the court. *Loving, et al. v. United States*, 32 F. Supp. 464, affirmed 310 U. S. 609; *Eastern Carrier Corp. v. United States*, 31 F. Supp. 232, affirmed U. S., 60 S. Ct. 898; *Philadelphia-Detroit Lines v. United States*, 31 F. Supp. 188.

The petitioner recognizes the above stated principles but contends that the Commission erred as a matter of law in four particulars.

It is first contended that although the Commission received evidence of operations for the "interim" period from June 1, 1935, to October 15, 1935, that it gave no consideration to such evidence, and that it erred in refusing to make a finding and grant a certificate under the provision of the "interim" section, Section 206(b), 49 U. S. C. A. § 306(b). The Commission received evidence of the "interim" operations of the petitioner and it will not be presumed that it failed to give due consideration to such evidence in passing upon the application for "grandfather" rights. Moreover, it appears that on October 30, 1939, Howard Hall Company, Inc., filed a separate application with the Commission for authority to operate under the provisions of Section 206(b), and that after a hearing the Commission issued a certificate of public convenience and necessity authorizing the carrier to carry on certain operations. No. Mc-42318 (sub-No. 1) Interstate Commerce Commission. There is no merit in the contention that other rights under Section 206(b) should be granted under this petitioner's "grandfather" application.

The petitioner's present contention is but an attempt to re-try issues already heard and determined by the Commission in another proceeding.

The petitioner's second contention is that there was evidence and a finding that there had been 55 movements of freight to and from an area within 100 miles of Birmingham prior to June 1, 1935, and 270 movements in the area thereafter, and that the Commission, therefore, erred as a matter of law in limiting operations "between Birmingham, Alabama, and all points within 10 miles thereof", and that the area should have been "within 100 miles of Birmingham". As to movements of freight in the 100 mile area the Commission found that of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, and that only 55 moved from points within 100 miles of Birmingham [fol. 244] ham, and that only "12 points were served in this comparatively large territory surrounding applicant's headquarters in Birmingham." Of 2,550 shipments transported after June 1, 1935, only 270 moved to or from 100 miles of Birmingham. The evidence of shipments within the 100 mile area claimed by the petitioner did not show substantial, *bona fide* operations of sufficient regularity to require the issuance of a certificate under the "grandfather clause" authorizing free lance operation in this large territory. In limiting the applicant's operations to and from Birmingham to a ten mile zone beyond the city limits of Birmingham the Commission acted within its authority and not capriciously or arbitrarily.

The petitioner further contends that the Commission had no right to consider evidence of continuous operations beyond the date of the filing of the "grandfather" application. There is no merit in this contention. Those who seek "grandfather" rights under Section 206(a) must establish not only that they were in *bona fide* operation on June 1, 1935, but also that such operations were carried on continuously "since that time". In other cases, as here, the Commission has consistently refused to determine the rights of an applicant as of the date of the filing of the application, and has held that the requirement of continuity of operations is not dispensed with when the application for a "grandfather" application is filed. The words of the statute, "since that time", may not be limited and construed to mean "since that time and until the filing of an application". Evidence

of activities of the petitioner subsequent to the filing of the application was properly received and considered by the Commission. *United States v. Maher*, 307 U. S. 148, 155; *Gregg Cartage & Storage Co. v. United States, et al.*, D. C., N. D. of Ohio, recently decided, — F. Supp.—; *Atlantic Motor Exp., Inc., Common Carrier Application*, 12 M. C. C. 576, 579-580.

The petitioner's final contention is that the Commission was without authority to limit certain of its operations to the transportation of specified commodities between designated points. Upon the evidence before it the Commission found that:

[fol. 245] 1. "• • • prior to and since June 1, 1935, applicant has held itself out to transport general commodities, with certain exceptions, between Birmingham and vicinity, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those points in Florida north of and including Tampa and Lakeland, and has actually conducted an operation consistent with such holding out."

2. "In addition the record shows that, prior to and since June 1, 1935, the applicant transported paper and paper products from Birmingham to New Orleans, La., and Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; cloth from Alabama City, Ala., to Wheeling, W. Va.; and matches from Wheeling to Chattanooga and Birmingham."

Consistent with the first finding above quoted the Commission granted general authority to transport commodities in the territories there named. In accordance with the second finding the Commission limited the Applicant's authority to the territory and points named and the commodities listed. Applicant was thereby granted authority, both general and limited, to carry on virtually every substantial operation in which it had been engaged when the "grand-father clause" became effective. Under the facts and circumstances of the case this limitation upon the carrier's authority was just and equitable, and in so holding the Commission acted clearly within its province. *Loving, et al. v. United States*, 32 F. Supp. 464, affirmed 310 U. S. 609; *Eastern Carrier Corp. v. United States*, 31 F. Supp. 232,

affirmed 60 S. Ct. 898; Cf. Carolina Freight Carriers Corp. v. United States, D. C. of W. D. of N. C., decided April 5, 1941, — F. Supp. —.

On the record before us, which includes a transcript of the evidence before the Commission and a copy of the exhibits, we are of opinion and so hold that the evidence justified the order which was entered. The findings and holdings of the Commission are supported by the evidence, are not arbitrary or capricious, and will not be disturbed.

This court finds no reason to set aside, annul, or suspend the order of the Commission. The complaint is without merit and is hereby.

Dismissed.

Done this 17th day of April, 1941.

Leon McCord, United States Circuit Judge. C. B.

[fol. 246] Kennamer, United States District Judge.

T. A. Murphree, United States District Judge.

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

[Title omitted.]

**Findings of Fact and Conclusions of Law—Filed May 26, 1941**

#### FINDINGS OF FACT

The Court makes the following findings of fact:

1. Plaintiff is a corporation organized and existing under the laws of the State of Alabama and as such is engaged as a common carrier by motor vehicle in interstate commerce.
2. Plaintiff was engaged in the business of a common carrier by motor vehicle in interstate commerce on and prior to June 1, 1935. On February 11, 1936, it filed application with the Interstate Commerce Commission for certificate of public convenience and necessity under the "grandfather" clause of section 206(a) of the Motor Carrier Act of 1935, seeking a certificate authorizing continuance of its operation claiming such rights as a common carrier of general commodities between all points in Kentucky, Alabama, Georgia, Tennessee, Indiana, Illinois, Wisconsin, Missouri, Ar-

kansas, Louisiana, Ohio, Mississippi, Florida, South Carolina, North Carolina, West Virginia, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, and the District of Columbia, and all points in Michigan within 200 miles of Detroit and Benton Harbor, all points in Kansas within 200 miles of Topeka and Garnett, and all points in Texas within 200 miles of Henderson. The application was amended during the Commission hearings to eliminate therefrom all points in Wisconsin, Texas, Arkansas, Kansas, Missouri, and points in Florida south of Tampa and [fol. 248] Lakeland, and points north of Chicago.

3. The application was filed and docketed by the Interstate Commerce Commission and formal hearings were held on February 15, 1937 and on August 20, 1937. Other parties appeared as protestants. Following the filing of reports and recommendations of the hearing examiners, Division 5 of the Interstate Commerce Commission made and entered its report and order on July 10, 1940, to the effect that the applicant had not served "enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application." The decision and report of the Commission decided that the applicant was "on June 1, 1935, and continuously since that time, has been, in *bona fide* operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except commodities of unusual value, . . ., between Birmingham, Alabama, and all points within 10 miles thereof, on the one hand, and, on the other, all points in North Carolina, Georgia, Mississippi, South Carolina, and those in Florida on and north of a line consisting of U. S. Highway 92 from Tampa to Kissimmee, thence U. S. Highway 92 to Melbourne; of paper and paper products from Birmingham to New Orleans, La., Chattanooga and Knoxville, Tenn., and from Kingsport, Tenn., to Birmingham; of nails, pipe, pipe fittings, steel, and metal ceilings from Canton, Ohio, to Birmingham; of cloth from Alabama City, Ala., to Wheeling, W. Va.; and of matches from Chattanooga and Birmingham; all over irregular routes;" and that by reason of such operation was entitled to a certificate authorizing the continuance of that operation, and that the application in all other respects should be denied.

The order entered with the report was made effective on August 31, 1940, but was by the Commission extended to February 3, 1941. Complaint was filed herein February 28, 1941, seeking to enjoin, set aside, and render ineffective that portion of the Commission's report and order which denied part of the application for a "grandfather" certificate. The Interstate Commerce Commission intervened as a party defendant and at a hearing held in Birmingham, Ala., on April 14, 1941, before a court of three judges, counsel for all parties stipulated and agreed upon submission of the case for decision upon its merits.

[fol. 249] 4. The Commission received evidence of the "interim" operations of plaintiff between June 1, 1935, and October 15, 1935, and it will not be presumed that it failed to give due consideration to such evidence in connection with the application for "grandfather" rights. Plaintiff, on October 30, 1939, filed a separate application with the Commission for authority to operate under provisions of section 206(b), and after hearing the Commission issued a certificate authorizing it to carry on certain operations.

5. As to plaintiff's second contention the evidence shows, as was stated in the Commission's decision and report, that prior to June 1, 1935, the plaintiff had moved 55 shipments of freight to and from an area within 100 miles of Birmingham, and of a total of 1,000 shipments there were 875 to or from the City of Birmingham, and of the 55 shipments within the 100 miles of Birmingham only 12 points were served in the comparatively large territory surrounding its headquarters in Birmingham; that since June 1, 1935, out of 2,550 shipments only 270 moved from the area within 100 miles of Birmingham.

6. The Commission did consider evidence of plaintiff's operations from prior to June 1, 1935, up to the date of decision and report, or up to the date of the final hearing.

7. The Commission's decision and report limited the authority granted as to certain named points and territory and with respect to certain commodities as listed.

## CONCLUSIONS OF LAW.

And the Court sets forth the following as its conclusions of law:

1. The report, findings, and holdings of the Commission are justified and supported by the evidence, are not arbitrary or capricious.

2. The plaintiff was not engaged in "bona fide" operation as a motor carrier on June 1, 1935, and since that time as claimed in its application within the provisions of section 206(a) of the Motor Carrier Act of 1935, and was so engaged only as to the territory and commodities named, listed, and approved in the Commission's report and decision of July 10, 1940.

[fol. 250] 3. Evidence of "interim" operations of plaintiff between June 1, 1935, and October 15, 1935, as applicable under the provisions of section 206(b) of the Motor Carrier Act of 1935, create no additional rights under the provisions of section 206(a) and will properly be considered as a part of the evidence under the application for "grandfather" rights. There is no merit in the contention that other rights under section 206(b) should be granted under plaintiff's "grandfather" application.

4. The evidence of shipments within the 100-mile area adjoining the City of Birmingham, Ala., as claimed by the plaintiff did not show substantial "bona fide" operations of sufficient regularity to require the issuance of a certificate under the "grandfather" clause authorizing free-lance operation in this large territory, and the report and decision of the Commission which limited operations to a 10-mile zone beyond the city limits of Birmingham, Ala., were within its authority and not arbitrary and capricious.

5. The provision of the Motor Carrier Act of 1935 with reference to "grandfather" rights under section 206(a), requiring evidence of "bona fide" operation on June 1, 1935, and "since that time" does not limit Commission consideration of evidence of continuous operations to a period of time prior to the filing of the application, and evidence of activities subsequent thereto as considered by the Commission was lawful and proper as provided for under section 206(a).

6. The limitation upon applicant's authority, as granted by the Commission, to certain named commodities as to a part of the territory and points therein was justified by the evidence showing that it covered virtually every substantial operation in which it had been engaged under the provisions of section 206(a), was just and equitable and clearly within the authority of the Commission.

7. Plaintiff's complaint herein should be dismissed.

Leon McCord, United States Circuit Judge. C. B. Kennamer, United States District Judge. T. A. Murphree, U. S. District Judge.

[fol. 251] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Civil Action. No. 5215

HOWARD HALL COMPANY, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

DECREE—Filed May 26, 1941

The above-entitled action, brought under 28 U. S. C. A. 41 (28) to enjoin and set aside an order of the Interstate Commerce Commission at Birmingham, Ala., on April 14, 1941, and having been submitted upon the hearing for final decree, and the Court having filed its findings of fact and conclusions of law which are by reference made a part hereof; Now, therefore, for the reasons set forth in the written opinion filed herewith,

It is ordered, adjudged and decreed that plaintiff's complaint herein be and the same is hereby dismissed.

Leon McCord, United States Circuit Judge. C. B. Kennamer, United States District Judge. T. A. Murphree, United States District Judge.

April 17, 1941.

[fol. 252] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1941

[Title omitted]

## ASSIGNMENTS OF ERROR—FILED May 2, 1941

The Appellant, Howard Hall Company, Inc., assigns the following errors in the record and proceedings in this cause:

1

The District Court, composed of three judges, erred as a matter of law in affirming the decision of the Commission of July 10, 1940, which denied part of appellant's application before said Commission, and in refusing to set aside said order, because as a matter of law it was the duty of the Commission to consider the evidence introduced by appellant before the Commission of operations between June 1, 1935 and October 15, 1935 in accordance with the provisions of Section 206 (b) of the Motor Carrier Act, 49 Stat. 551, 52 Stat. 1238. The District Court erred in affirming the decision of the Commission in which the Commission refused to consider said evidence and failed to make a finding thereon.

2

The District Court erred as a matter of law in affirming the decision of the Commission, because the Commission, in its decision, specifically found that appellant had transported 55 movements of freight to and from points within [fol. 253] 100 miles of Birmingham, Alabama, prior to June 1, 1935 but limited the authority granted appellant to Birmingham, Alabama and a radius of ten miles thereof. As a matter of law, under Section 206 (a) of the Motor Carrier Act, the Commission was bound to grant authority in accordance with the undisputed evidence of operations prior to June 1, 1935 (52 Stat. 1238), to-wit: At least from Birmingham and 100-mile radius thereof. Failure to set aside said order which limited the authority of applicant to ten miles of Birmingham was error.

3

The District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission where-

in said Commission limited the operating rights of appellant under its application to the transportation of particular commodities over certain routes and within certain territories, because as a matter of law the Commission had no authority to place any limitation on the operating rights of the appellant with respect to the commodities transported. Under Section 206 (a) of the Motor Carrier Act, 52 Stat. 1238, the Commission could only authorize operation over routes and territories and it was beyond their jurisdiction to attempt to limit commodities to be transported. Failure to set aside and annul the order upon this ground was error.

4

The District Court erred as a matter of law in affirming the decision of the Commission wherein the Commission decided that it had authority to consider evidence of operations beyond the date of filing the application, to-wit: February 11, 1936, because under Section 206 (a) of the Motor Carrier Act, 52 Stat. 1238, the Commission is limited as a matter of law in considering continuity of operations prior to June 1, 1935 and since that time up to the date of filing the application, to-wit: February 11, 1936: It was error not [fol. 254] to set aside such order because it was based on evidence which the Commission was without jurisdiction to consider.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said decree of the District Court of the United States for the Northern District of Alabama, Southern Division, dated April 17, 1941 in the above entitled cause be reversed and a decree entered in favor of this appellant.

Boutwell & Pointer, 807 Massey Building, Birmingham, Alabama, Edgar Watkins and Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia, Attorneys for Petitioner.

[fol. 255] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1941

[Title omitted]

PETITION FOR APPEAL—Filed May 2, 1941

To the District Court of the United States for the Northern District of Alabama, Southern Division, Composed of Circuit Judge McCord and District Judges Kennamer and Murphree:

Petitioner, Howard Hall Company, Inc., considers itself aggrieved by the final judgment of the District Court of the United States for the Northern District of Alabama, Southern Division in the above entitled cause where petitioner sought to set aside an order of the Interstate Commerce Commission denying certain parts of its application to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 206 (a) of the Motor Carrier Act of 1935. 52 Stat. 1238.

This cause began by petitioner filing a complaint against the United States of America, which complaint attacked the validity of an order of the Interstate Commerce Commission, denying portions of its application under Section 206 (a) of the Motor Carrier Act of 1935. The petition attacked the validity of the order on several grounds, which are more fully set out in the assignments of error filed herewith pursuant to Rule 9 of the Rules of the Supreme Court of the United States. There is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Rules of [fol. 256] the Supreme Court of the United States.

Petitioner avers that in its application before the Interstate Commerce Commission, it sought operating rights as a motor carrier in interstate commerce over certain designated territory and the Commission, by its order, which petitioner sought to set aside, denied portion of the application, which order was affirmed by this court, composed of three judges. Petitioner avers that it has operated in accordance with its application for the past six years and that unless a supersedeas is granted to the decision and decree of the District Court dated April 17, 1941, petitioner will suffer irreparable injury by reason of having to cease and desist from operations it has conducted for the past

seven years and which the said right to conduct are involved in this appeal.

Wherefore, your petitioner prays for the allowance of an appeal from the District Court of the United States for the Northern District of Alabama, Southern Division, composed of Circuit Judge McCord and District Judges Kennamer and Murphree, to the Supreme Court of the United States, in order that the decision and final judgment of the District Court may be examined and reversed. Petitioner further prays that the proceedings and papers in this cause may be sent to the Supreme Court of the United States as provided by law and that a supersedeas be granted pending final determination of this appeal to the Supreme Court of the United States and that the cost bond tendered by the petitioner be approved.

This 2nd day of May, 1941.

Boutwell & Pointer, 807 Massey Building, Birmingham, Alabama, Edgar Watkins & Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia, Attorneys for Petitioner.

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[fol. 257] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1941

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 15, 1941

Appellant in the above entitled cause having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States from the decree of the District Court made and entered in the above entitled cause on April 17, 1941 and having presented and filed its petition for appeal, accompanied by an assignment of errors, a statement as to jurisdiction and prayer for reversal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is Now Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final decree of the District Court composed of Circuit Judge McCord and District Judges Kennamer and Murphree, dated April 17, 1941, and

It is Further Ordered that the Clerk of the District Court for the Northern District of Alabama, Southern Division, shall, within forty (40) days from this date make and transmit to the Supreme Court of the United States a true copy of the material parts of the record, which shall be designated by praecipe or stipulation of the petitioner and counsel herein.

It is Further Ordered that appellant shall give good and [fol. 258] sufficient bond in the sum of Five Hundred Dollars (\$500.00) that said Appellant shall prosecute said appeal to effect and answer all costs if it fails to make good its plea.

It is Further Ordered that the judgment of the District Court of the United States for the Northern District of Alabama, Southern Division, dated April 17, 1941 be and the same is hereby superseded in this cause until final determination of said cause by the Supreme Court of the United States, the appellant having given good and sufficient supersedeas bond in the sum of Ten Thousand Dollars (\$10,000.00).

Done by this Court this 2nd day of May, 1941.

Circuit Judge Leon McCord, District Judge C. B. Kennamer, District Judge T. A. Murphree.

[fol. 259-286] Citation in usual form showing service by affidavit on Attorney General of the United States omitted in printing.

[fol. 287] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1941

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF PARTS OF THE RECORD—Filed June 30, 1941

Appellant, Howard Hall Company, Inc., in accordance with paragraph 9 of Rule 13 of the Supreme Court, will rely on the following points:

That the District Court erred as a matter of law in affirming the decision of the Interstate Commerce Commission of

July 10, 1940, which denied part of appellant's application to the Commission and in refusing to set aside said order, because as a matter of law it was the duty of the Commission to consider evidence introduced by applicant of operations between June 1, 1935 and October 15, 1935, in accordance with provisions of Section 206(b) of the Motor Carrier Act, 49 Stat. 551, 52 Stat. 1238. The District Court erred in affirming the decision of the Commission in which the Commission refused to consider said evidence and failed to make a finding thereon.

[fol. 288]

2

That the District Court erred as a matter of law in affirming the decision of the Commission because the Commission in its decision specifically found that appellant had transported 55 movements of freight to and from points within 100 miles of Birmingham, Alabama, prior to June 1, 1935, but limited the authority granted appellant to Birmingham, Alabama, and a radius of 10 miles thereof. That as a matter of law, under Section 206(a) of the Motor Carrier Act, 52 Stat. 1238, the Commission was bound to grant, in accordance with the undisputed evidence of operations prior to June 1, 1935, to-wit: At least from Birmingham, Alabama, and 100-mile radius thereof. The failure to set aside said order, which limited the authority of the applicant to 10 miles of Birmingham, was error.

3

That the District Court erred as a matter of law in affirming the decision of the Commission wherein said Commission limited the operating rights of appellant under its application to the transportation of particular designated commodities over certain routes and within certain territories because as a matter of law the Commission had no authority to place any limitation on the operating rights of the appellant with respect to the commodities transported. Under Section 206(a) of the Motor Carrier Act, 52 Stat. 1238, the Commission could only authorize operations over routes and territories and it was beyond its jurisdiction to limit applicant to certain designated commodities. Failure to set aside and annul the order upon this ground was error.

The foregoing designated points will be relied upon by the appellant.

[fol. 289] Appellant designates the following parts of the record, which it designates necessary for the consideration of the foregoing points relied upon:

- (1) Appellant's petition, including the exhibits attached thereto.
- (2) The application of the appellant to the Interstate Commerce Commission on its Form BMC-A, filed February 11, 1936.
- (3) The decision and opinion of Division 5 of the Interstate Commerce Commission of July 10, 1940.
- (4) Order of the Interstate Commerce Commission issued February 3, 1941, which denied appellant's petition for further hearing.
- (5) The opinion, findings of fact, conclusions of law and decree of the United States District Court for the Northern District of Alabama, Southern Division, composed of Circuit Judge McCord and District Judges Kennamer and Murphree.
- (6) Assignments of error filed herein.
- (7) Petition for appeal herein and order thereon.
- (8) Citation on appeal, with service thereon.
- (9) This statement.

Albert Boutwell, 807 Massey Building, Birmingham, Alabama; Edgar Watkins and Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia.

June 28, 1941.

[fol. 290] GEORGIA,  
Fulton County.

Personally appeared before the undersigned officer, duly authorized to administer oaths, Allan Watkins, who, after being duly sworn, deposes and says that he has on this the 28th day of June, 1941, mailed a copy of the foregoing statement of points and designation of record to the Attorney-General of the United States, to the attorney of record for

the Interstate Commerce Commission and also to the United States District Attorney for the Northern District of Alabama, Southern Division.

Allan Watkins.

Sworn to and subscribed before me this the 28th day of June, 1941. Lucille H. Printup, Notary Public, Georgia, State at Large. (Seal.)

[fol. 291] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1941

[Title omitted]

DESIGNATION BY APPELLEES OF ADDITIONAL PORTIONS OF RECORD TO BE PRINTED—Filed July 5, 1941

Appellees designate for printing the following additional portions of the record:

1. Answer of the United States of America, filed April 14, 1941.
2. Answer of the Interstate Commerce Commission, filed April 14, 1941.
3. Appellees' Exhibit 1 introduced at the trial, being a copy of certain documents, duly certified by the Secretary of the Interstate Commerce Commission, relating to the proceeding known as Docket No. MC-42318, instituted by appellant before the Interstate Commerce Commission.
4. This designation.

Charles Fahy, Acting Solicitor General; S. R. Birmingham, Jr., Special Assistant to the Attorney General, Counsel for the United States. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission; Allen Crenshaw, Attorney, Interstate Commerce Commission, Counsel for the Interstate Commerce Commission.

[fol. 292] We certify that a copy of the foregoing Designation By Appellees of Additional Portions of Record to be Printed was this day mailed to:

Boutwell & Pointer, 807 Massey Building, Birmingham, Alabama.

Edgar Watkins and Allan Watkins, 1403 Citizens & Southern National Bank Building, Atlanta, Georgia, Counsel for plaintiff-appellant.

S. R. Brittingham, Jr., Special Assistant to the Attorney General, Counsel for the United States.

July 3, 1941.

Endorsed on Cover: File No. 45,538. N. Alabama, D. C. U. S., Term No. 210. Howard Hall Company, Inc., Appellant, vs. The United States of America and Interstate Commerce Commission. Filed June 26, 1941. Term No. 210 O. T. 1941.

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